Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

JIMMY D. CARTY,

Petitioner,

v.

CRAIG NELSON, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Due Process Clause of the Fourteenth Amendment, can an individual be involuntarily committed to a State mental hospital without being afforded the opportunity to confront and cross-examine the witnesses against him?

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PETITION FOR A WRIT OF CERTIORARI

Mr. Carty respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pregerson, Circuit Judge) (Appendix, *infra*, ("App.") 1a-24a), filed October 17, 2005, is reported at 426 F.3d 1064. The Ninth Circuit's order (App. 25a-26a), filed December 15, 2005, amending the opinion and denying the parties' petitions for rehearing, is reported at 431 F.3d 1185. The opinion of the United States District Court for the Southern District of California (App. 27a-40a), filed July 31, 2003, is unreported. The California Court of Appeal's opinion (App. 42a-52a), filed May 11, 2000, is unreported. The California Supreme Court's denial of review (App. 41a), is unreported. The California Superior Court's order for commitment (App. 56a-58a), filed June 24, 1999, pursuant to its decision issued from the bench at the commitment hearing (App. 59a-114a), is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its opinion on October 17, 2005. Both Mr. Carty and the State timely filed respective petitions for rehearing on November 7, 2005. The Ninth Circuit filed an order amending the opinion and denying the parties' rehearing petitions on December 15, 2005. App. 25a-26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

California's Sexually Violent Predators Act ("SVPA"), Cal. Welf. & Inst. Code §§ 6600-6609.3 (West 1998 & Supp. 1999), is reprinted in full at App. 115a-139a.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE

1. Overview

As Mr. Carty's prison term was coming to an end, the San Diego County District Attorney instituted a civil commitment proceeding against him under California's Sexually Violent Predators Act ("SVPA"), Cal. Welf. & Inst. Code §§ 6600-6609.3 (West 1998 & Supp. 1999). Before the State could institutionalize Mr. Carty under the SVPA, it had the burden of proving several facts beyond a reasonable

doubt, including two or more predicate crimes involving "substantial sexual conduct," which had never been proved or admitted in the underlying criminal prosecution for lewd acts. Under the "*People v. West*" plea bargain offered by the District Attorney, Mr. Carty had admitted to no facts underlying the charges, and the plea could not be used against him in a subsequent civil proceeding.

At the civil commitment hearing, the State elected not to call witnesses to testify subject to confrontation and cross-examination. Instead, the State proffered only documents riddled with multiple levels of hearsay, including a probation report from the sentencing eight years earlier that consisted almost exclusively of the probation officer's summary of a police report, which purported to repeat statements made by fact witnesses. Although the trial court struggled to make sense of the otherwise inadmissible multiple-level hearsay, the court concluded, over Mr. Carty's objection, that it was entitled to make the required factual findings of two predicates crimes involving "substantial sexual conduct" based solely on these out-of-court statements because of certain language in the SVPA allowing documentary evidence, including probation reports, to be used to prove the details of underlying prior offenses. The SVPA was enacted in 1995—four years after Mr. Carty's plea deal and sentencing.

Mr. Carty was civilly committed for a two-year term in a State mental hospital. After exhausting state court remedies, he filed a *pro se* habeas petition in Federal district court, which was denied. Mr. Carty's appeal to the Ninth Circuit squarely presented the question whether, under the Due Process Clause of the Fourteenth Amendment, a citizen has the right to confront and cross-examine witnesses when the State seeks to deprive him of his liberty in a civil commitment

proceeding, or instead whether the government may carry its burden of proof based solely on hearsay, often multiple layers of hearsay imbedded in documents such as police reports, probation reports, and psychologists' evaluations. The Ninth Circuit panel held that Supreme Court precedent does not afford Mr. Carty such due process rights, and affirmed the district court's order denying the habeas petition.

2. Underlying Criminal Proceedings

In 1991, Mr. Carty pleaded guilty, before trial and without a preliminary hearing, to seven counts of lewd acts with children under age fourteen in violation of California Penal Code § 288(a). With respect to five counts, he entered a "*People v. West*" plea, meaning that he did not admit any facts underlying the violations, and his plea could not be used against him in subsequent civil proceedings. App. 6a-7a (citing *People v. West*, 477 P.2d 409 (Cal. 1970); *In re Alvernaz*, 830 P.2d 747, 752 (Cal. 1992) (stating that a plea proffered under *People v. West* is a plea of *nolo contendere* that does not admit a factual basis for the plea)); App. 46a-47a, 68a-69a, 93a. He pleaded solely for the benefit of the plea bargain offered by the State. App. 68a-69a, 93a.

As part of the plea bargain, the District Attorney agreed to a maximum sentence of 20 years' imprisonment for all counts. Clerk's Transcript at 9, People v. Carty, No. DO33778 (Cal. Ct. App. Aug. 4, 1999). The total statutory minimum for the counts was 21 years, and the total maximum was 56 years. *Id.* at 29. In other words, the District Attorney agreed to a sentence *below* the statutory minimum that would have applied absent a plea bargain. The Probation Department prepared a report for the judge's use at sentencing. The portion of the probation report purporting to describe the facts of the offenses was based largely on the police report, which contained statements from the victims

and their parents. App. 7a, 77a, 91a. No witnesses were called at sentencing.

3. State Civil Commitment Proceedings

Eight years later, in 1999, a day before Mr. Carty was to be released on parole, the District Attorney instituted a civil commitment proceeding against him under the SVPA. The SVPA was enacted in 1995, four years after Mr. Carty reached his plea bargain with the District Attorney and was sentenced. To civilly commit Mr. Carty, the State had to prove several facts beyond a reasonable doubt: (1) two or more of the five counts to which he pleaded under *People v. West* involved "substantial sexual conduct"; (2) he had a diagnosed mental disorder which made him a danger to others; and (3) he was likely to re-offend on account of his mental disorder. App. 7a-8a, 68a-70a, 106a; Cal. Welf. & Inst. Code §§ 6600, 6600.1, 6604.

"Substantial sexual conduct" was not an element or necessary component of the offenses to which Mr. Carty pleaded. A violation of Penal Code § 288(a) may consist of nothing more than an otherwise innocuous touching coupled with lewd intent. *People v. Martinez*, 903 P.2d 1037, 1046-48 (Cal. 1995) (holding that statute is violated by "any touching" with intent to arouse sexual desire in either perpetrator or child; discussing examples such as brushing a child's hair or touching his or her arm). The judge presiding over the civil commitment hearing was troubled by the prosecutors' practice of using *People v. West* pleas because they are "not clear" and "create[] a lot of problems," and he "strongly ma[d]e a recommendation to the District Attorney's Office" not to use them in cases alleging molestation. App. 71a-74a. The judge emphasized how difficult it is for "the Court at a later time such as this [to] determin[e] what occurred." App. 72a-73a. The prosecutor conceded that

People v. West pleas were problematic in this context. App. 72a-73a.

Despite the court's admonition, the District Attorney elected not to call witnesses, instead proffering only documents—the 1991 police report, the 1991 probation report, sentencing papers from the court file, and psychologists' evaluations—prepared for the SVPA proceeding—which were themselves hearsay and contained additional layers of hearsay within them. App. 73a-76a. Mr. Carty made a hearsay objection to the admission of documents to prove predicate crimes involving "substantial sexual conduct," and also objected to admission of the hearsay on Fourteenth Amendment grounds and the constitutional rights of confrontation and cross-examination of witnesses. App. 70a-71a, 83a-87a, 88a-90a, 93a-94a, 107a-110a. In response to a question from the court, Mr. Carty's counsel made clear that he was not waiving his right "to have those witnesses come into court." App. 93a-94a.[1]

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[1] The Ninth Circuit opinion contains a significant factual error, perhaps typographical. The opinion states: "Carty's counsel did not object to admission of the reports prepared by the State's mental health experts as evidence that Carty had two predicate crimes involving 'substantial sexual conduct' (the second element) and that Carty had a mental disorder that made him a danger to others (the third element)." App. 8a. Instead, that sentence should read: "Carty's counsel did not object to admission of the reports prepared by the State's mental health experts as evidence that Carty had a mental disorder that made him a danger to others (the second element) and that Carty was likely to re-offend on account of his mental disorder (the third element)." That is, Mr. Carty did, in fact, object to the admission of any hearsay as evidence that he had two predicate crimes involving "substantial sexual conduct" (the first element). The next sentence of the Ninth Circuit opinion thus correctly though incompletely states: "Carty's counsel, however,

The probation report was riddled with multiple layers of hearsay. App. 75a-76a. According to the District Attorney, "[t]his probation report was done relying almost exclusively on information that came from the police report . . . and . . . some additional conversations with the parents of the victims." App. 77a. The District Attorney's approach was simply to "go over . . . the details regarding each of those [five *People v. West*] counts which are contained both in the probation report and the police report which the probation officer relied on in making her report, and basically argue that the facts stated in the probation report from the police report constitute substantial sexual conduct." App. 76a. The District Attorney also relied on multiple-level-hearsay evidence in psychologists' reports. *E.g.*, App. 104a, 107a-110a. The State argued that under the SVPA's language, the court could consider this multiple-level hearsay.[2] App. 77a-78a.

Notwithstanding the court's comment earlier in the hearing that Mr. Carty had "the right to be confronted by any witnesses against [him]" (App. 64a-65a), and notwithstanding its conclusion that the police report was inadmissible,[3] the

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contested the admission of the probation report as proof that Carty's conduct in two of his *West* offenses involved 'substantial sexual conduct' (the first element)." App. 8a.

[2] According to the State's view of the SVPA regime, courts should be allowed to consider even multiple-level hearsay in the prosecutors' statement in aggravation from the underlying criminal case, which is a one-sided advocacy piece "based on [the prosecutors'] own knowledge of the facts of the case from the police report and conversations with the victims." App. 78a.

[3] App. 78a-82a (citing Cal. Evid. Code § 1271); *see also* App. 91a-92a (prosecutor conceded inadmissibility of police report).

court admitted and relied on the probation report. The probation report was, in the government's own words, "frankly a regurgitation of the police report"—"a repeat of the police report and a summary of the police report." App. 91a. But because of the SVPA's language—that "[t]he details underlying the commission of an offense that led to a prior conviction . . . may be shown by . . . probation and sentencing reports, and evaluations by the State Department of Mental Health"[4]—and the possibility that some criminal defendants may challenge probation reports at sentencing, the judge admitted the report. App. 80a-82a, 89a, 92a-93a. The judge also admitted the psychologists' reports. App. 92a-93a.

The judge struggled to decipher the sparse hearsay in the reports and determine what had actually happened. App. 96a-113a. Ultimately, he based his findings—that two of the five offenses involved substantial sexual conduct—on a few multiple-level-hearsay statements in the probation report and, for one offense, on one multiple-level-hearsay statement in the Sheppard psychological report.[5] App. 104a-113a. The judge made no ruling that any of these statements fell within an exception to the hearsay rule, was reliable, or had indicia of trustworthiness.

Mr. Carty was ordered committed to a two-year term of confinement in custody of the State Department of Mental

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[4] Cal. Welf. & Inst. Code § 6600(a). In the current version of the code, this language is found in section 6600(a)(3). Cal. Welf. & Inst. Code § 6600(a)(3) (West 1998 & Supp. 2006).

[5] By way of example, the sole evidence supporting the finding on one count consisted of statements from the probation report (itself hearsay), which was a summary of what the probation officer read in the police report (also hearsay), which purportedly repeated a statement by a child (also hearsay). App. 105a-106a, 110a-113a.

Health, at Atascadero State Hospital. App. 56a-58a, 113a. Near the end of this term, the District Attorney successfully petitioned for Mr. Carty's recommitment for two more years, proving the second and third of the three necessary elements under the SVPA. The issue of predicate crimes involving "substantial sexual conduct" was not relitigated and redecided. App. 15a, 53a-55a. In 2003, the District Attorney sought a third two-year term, but a jury found that Mr. Carty should no longer be committed. App. 3a.

4. State Appellate Proceedings

Mr. Carty appealed his 1999 commitment to the California Court of Appeal, which affirmed the judgment in an unpublished decision. The court's abbreviated due process discussion began by stating that "a respondent in a civil proceeding, such as this, has a due process right to confront and cross-examine witnesses." App. 50a. But the court then stated that actual confrontation and cross-examination was unnecessary; these due process rights could be satisfied, in the court's view, "if the method for challenge available to the respondent provides the benefits that derive from confrontation and cross-examination." App. 50a. The court reasoned that "[t]he legislative balance of interests is appropriate because [the SVPA] . . . provides a respondent with a meaningful opportunity to attack the credibility of the prosecution's evidence." App. 50a-51a. According to the court, due process was satisfied because "[Mr. Carty] could have presented conflicting evidence on his own behalf in order to undermine the prosecution's case" (App. 50a), even though the testimonial hearsay statements the State proffered were not, by definition, live testimony and not subject to actual confrontation and cross-examination.

The California Supreme Court denied Mr. Carty's request for review. App. 41a.

5. District Court Habeas Proceedings

While Mr. Carty was serving his initial two-year term, he filed a *pro se* habeas petition in the United States District Court for the Southern District of California, invoking the court's jurisdiction under 28 U.S.C. § 2254. The district court denied Mr. Carty's petition. App. 27a-40a. The court noted that "[t]he Supreme Court has recognize a procedural due process right to confrontation in civil proceedings under the Fourteenth Amendment" but agreed with the California Court of Appeal that Mr. Carty's right was not violated because he "had the opportunity to call witnesses and challenge the accuracy of the reports used by the state court." App. 35a-36a. The court granted a certificate of appealability.

6. Ninth Circuit Decision

A panel of the Ninth Circuit reviewed *de novo* the district court's denial of the habeas petition, "looking to the 'last reasoned decision' by a state court, which in this case is the California Court of Appeal's unpublished opinion." App. 17a (citation omitted). Under AEDPA, the Ninth Circuit was to determine whether "[the] state court decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" App. 16a (quoting 28 U.S.C. § 2254(d)(1)).

Mr. Carty's appeal squarely presented the question whether, under the Due Process Clause of the Fourteenth Amendment, a citizen has the right to confront and cross-examine witnesses when the State seeks to deprive him of his liberty in a civil commitment proceeding, or instead whether the government may carry its burden of proof based solely on hearsay, often multiple layers of hearsay imbedded in

documents such as police reports, probation reports, and psychologists' evaluations. The Ninth Circuit panel held that Supreme Court precedent does not afford such due process rights, and affirmed the district court's denial of Mr. Carty's habeas petition. App. 18a-24a.

In briefing and oral argument, Mr. Carty argued that the decisions of the California Court of Appeal and United States District Court were contrary to, or at least involved an unreasonable application of, three of this Court's decisions: *Vitek v. Jones*, 445 U.S. 480 (1980); *In re Gault*, 387 U.S. 1 (1967); and *Goldberg v. Kelly*, 397 U.S. 254 (1970). The Ninth Circuit's limited treatment of the core due process issues does not even mention, much less discuss, *Gault* or *Goldberg*.[6] As for *Vitek*, the panel summarized that precedent as requiring seven protections for a prisoner facing involuntary commitment to a mental hospital, including "an opportunity at the hearing . . . to cross-examine witnesses called by the State." App. 19a. *Vitek* held that due process required the opportunity "to *confront* and cross-examine" the State's witnesses. *Vitek*, 445 U.S. at 494-95 (emphasis added). The panel posited, without elaboration, that "before being civilly committed under the [SVPA], Carty was accorded all of the procedural protections identified in *Vitek*." App. 21a.

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[6] This cannot be reconciled with the panel's statement near the end of the opinion that it was "looking to the Supreme Court cases on which Carty relies." App. 23a. Mr. Carty unambiguously relied on *Vitek*, *Gault*, and *Goldberg* in briefing, and at oral argument, Mr. Carty's counsel specifically identified these three decisions as the due process precedent on which he was relying. App. 141a-142a.

The panel next cited dicta from *Kansas v. Hendricks*, 521 U.S. 346 (1997), which was not one of the three conflicting precedents identified by Mr. Carty, for the general proposition that this Court has upheld involuntary commitment statutes "'provided the confinement takes place pursuant to proper procedures and evidentiary standards.'" App. 19a (quoting 521 U.S. at 357). The Ninth Circuit also noted that in *Hendricks*, this Court had concluded that the proceeding under the Kansas SVPA was civil rather than criminal, and that the Kansas statute contained strict procedural and evidentiary standards. App. 19a-20a (quoting 521 U.S. at 364-65). *Hendricks* dealt with a "substantive," not procedural, due process claim, as well as *ex post facto* and double jeopardy claims. 521 U.S. at 350.

The panel also found "enlightening" the California Supreme Court's opinion in *People v. Otto*, 26 P.3d 1061 (Cal. 2001), which rejected a procedural due process challenge under the SVPA. App. 20a-21a.

After its one-sentence dismissal of Mr. Carty's argument under *Vitek*, having ignored *Gault* and *Goldberg*, and its invocation of *Hendricks* and *Otto*, the court of appeals then turned to a policy discussion. Though the panel pointed out "the incentive for [criminal] defendants to enter into plea agreements," and therefore that "many of the facts underlying sex offenses are not determined by a trier of fact in a criminal proceeding" (App. 21a), the panel instead emphasized the California Legislature's intent to relieve victims of the burden of testifying about the details of the crime (App. 21a-22a). The court noted that the Legislature added the SVPA's provision on documentary evidence "after prosecutors complained that they must bring victims back to court to relitigate proof of prior convictions." App. 18a (internal quotation marks and citation omitted). The panel stated that

no Supreme Court decision imposing an obligation "to proffer only live testimony" at a civil commitment hearing had been identified. App. 21a.

Moreover, the panel reasoned that Mr. Carty's due process argument was "undercut[]" by the fact that, in the criminal proceeding eight years before the SVPA proceeding, he entered a plea bargain with prosecutors instead of going to trial, and he did not "challenge the content of the victims' statements in the probation report at the time of his sentencing." App. 22a. As noted, the SVPA was enacted in 1995, four years *after* Mr. Carty reached his plea bargain with the District Attorney and was sentenced.

The Ninth Circuit also made the judgment that "the documentary evidence used by the superior court . . . possessed sufficient indicia of reliability to meet" a particular provision of the SVPA, which the court characterized as a "statutory hearsay exception." App. 22a. The provision does not deal with reliability, but instead states: "The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health." Cal. Welf. & Inst. Code § 6600(a).[7] The court of appeals offered no facts or record citations in support of its sufficient-indicia-of-reliability assertion. App. 22a-23a.

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[7] In quoting this language, the panel opinion erroneously cites to section 6600.1. App. 22a.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit and California Court of Appeal Decisions Are Contrary to this Court's Precedents on an Important Question Under the Due Process Clause.

The Ninth Circuit panel correctly "recognize[d] that involuntary civil commitment 'constitutes a significant deprivation of liberty that requires due process protection.'" App. 18a (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). But the panel's holding that Mr. Carty did not have the right to confront and cross-examine material witnesses before being committed to a State mental hospital, and that instead the State may use multiple-hearsay evidence to prove outcome-determinative facts, is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" in *Vitek v. Jones*, *In re Gault*, and *Goldberg v. Kelly*. *See* 28 U.S.C. § 2254(d)(1). As recent Supreme Court authority has reinforced, it is important to assess the reliability of witness testimony "by testing in the crucible of cross-examination," *Crawford v. Washington*, 541 U.S. 36, 61 (2004), which Wigmore famously characterized as "beyond any doubt the greatest legal engine ever invented for the discovery of truth," John Henry Wigmore, 5 *Evidence in Trials at Common Law* § 1367, at 32 (Chadbourn rev. 1974).

Under AEDPA, a state court decision is "contrary to" Supreme Court precedent if the state court (1) arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) confronted facts that are materially indistinguishable from relevant Supreme Court precedent but arrived at an opposite conclusion. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000). An "unreasonable application" of Supreme Court precedent occurs when "the state court identifies the correct governing legal principle . . . but

unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

A. The Decisions Here Are Contrary to *Vitek v. Jones*.

The Ninth Circuit decision states:

> To analyze Carty's due process challenge, we first look to *Vitek v. Jones*, 445 U.S. 480 (1980), where the Supreme Court decided whether Nebraska violated a prisoner's due process rights by transferring him from prison to a state mental hospital for treatment. The Court held that in order to satisfy due process, a prisoner facing involuntary commitment to a mental hospital is entitled to: (1) written notice; (2) a hearing at which the evidence being relied upon for the commitment is disclosed to the prisoner; (3) *an opportunity at the hearing for the prisoner* to be heard in person, to present testimony and documentary evidence, and *to cross-examine witnesses called by the State*; (4) an independent decision-maker; (5) reasoned findings of fact; (6) legal counsel; *and* (7) effective and timely notice of these rights. *See id.* at 494-97.

App. 19a (emphasis added).

The Ninth Circuit panel was correct that *Vitek* held that due process requires an array of procedural protections for a prisoner facing involuntary transfer and commitment to a State mental hospital, including the right of cross-examination, although it bears noting that *Vitek* spoke in terms of both confrontation and cross-examination. *Vitek* held that among the panoply of procedural protections afforded a prisoner in an involuntary commitment proceeding is the right "to confront and cross-examine" the State's witnesses. 445 U.S. at 494-95. This constitutional right is in addition to, not

supplanted by, other rights, such as the prisoner's right to present documentary evidence and witness testimony. *Id.*

The panel baldly asserted, without elaboration, that "Carty was accorded all of the procedural protections identified in *Vitek* during his June 1999 initial civil commitment hearing." App. 21a. This is simply incorrect. Mr. Carty was *denied* the right to confront and cross-examine the individuals who purportedly made the out-of-court statements on which the trial court based its factual findings (that Mr. Carty engaged in "substantial sexual conduct" in connection with two of the offenses to which he pleaded under *People v. West* in the 1991 criminal proceedings). Over his objection, the State was allowed to forgo calling a single witness and instead to introduce documents summarizing what witnesses allegedly said out of court. The Ninth Circuit decision therefore plainly contradicts *Vitek*.

The California Court of Appeal's decision is likewise contrary to *Vitek*. That court's abbreviated due process discussion began by stating that "a respondent in a civil proceeding, such as this, has a due process right to confront and cross-examine witnesses." App. 50a. But the court then stated that actual confrontation and cross-examination was unnecessary; these due process rights could be satisfied, in the court's view, "if the method for challenge available to the respondent provides the benefits that derive from confrontation and cross-examination." App. 50a. The court reasoned that "[t]he legislative balance of interests is appropriate because [the SVPA] . . . provides a respondent with a meaningful opportunity to attack the credibility of the prosecution's evidence." App. 50a-51a. According to the court, due process was satisfied because "[Mr. Carty] could have presented conflicting evidence on his own behalf in order to undermine the prosecution's case" (App. 50a), even

though the hearsay statements the State proffered were not, by definition, live testimony and not subject to actual confrontation and cross-examination. The Due Process Clause requires more, and does not allow judges to exercise subjective judgments about what procedures arguably provide a "meaningful" substitute for, or "provide the benefits that derive from," the rights of confrontation and cross-examination. Allowing a defendant to present conflicting evidence on his own behalf is no substitute for affording him the right to confront and cross-examine the declarants relied upon by the State.[8]

Thus, Ninth Circuit (and California) law are now directly contrary to *Vitek*. And there is no material distinction between *Vitek* and this case. Indeed, in *Vitek*, the Court held that the liberty interest there was akin to the liberty interest in being free from involuntary civil commitment. 445 U.S. at 491-93. If anything, the liberty interest in *Vitek* is less weighty than the interest here because the prisoner in *Vitek* would have remained confined whether or not he was transferred to a mental hospital, whereas a person such as Mr. Carty would be entirely free from confinement if he avoided civil commitment.

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[8] As this Court has explained in the context of the Sixth Amendment, the "ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. "It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands." *Id.* at 65.

B. The Decisions Here Are Contrary to *In re Gault*.

In re Gault, 387 U.S. 1 (1967), addressed the procedures that a State must afford a juvenile under the Due Process Clause before committing him to a State industrial school as a delinquent. The case involved an alleged lewd telephone call from a 15-year-old boy to a neighbor. The State did not call the neighbor as a witness during the Juvenile Court hearing. *Id.* at 42-43, 56. The Court stated:

> Absent a valid confession adequate to support the determination of the Juvenile Court, *confrontation and sworn testimony by witnesses available for cross-examination were essential* for a finding of "delinquency" and an order committing Gerald to a state institution for a maximum of six years.

Id. at 56 (emphasis added). The Court "h[e]ld that, absent a valid confession, *a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination* in accordance with our law and constitutional requirements." *Id.* at 57 (emphasis added).

The panel and state court decisions in this case are directly contrary to *Gault*. Over Mr. Carty's objection, the trial court allowed the State to present unsworn, documentary hearsay rather than requiring sworn testimony by witnesses that could be confronted and subjected to cross-examination.[9] The panel

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[9] In briefing to the Ninth Circuit, the State suggested that Mr. Carty's right to confront and cross-examine the witnesses against him was satisfied because he could have called the declarants whose statements were in the police report (and, in turn, summarized in the probation report) to testify at the commitment hearing. This suggestion is a disguised attempt to shift the burden of proof in the

decision makes no mention of *Gault* despite Mr. Carty's reliance on *Gault* throughout briefing and at oral argument.

C. The Decisions Here Are Contrary to *Goldberg v. Kelly*.

Goldberg v. Kelly, 397 U.S. 254 (1970), addressed the due process requirements that must be followed before terminating public assistance payments to a welfare recipient. The Court held that "rudimentary due process" requires the State to conduct a hearing at which the recipient is allowed "to confront or cross-examine adverse witnesses." *Id.* at 267-68; *accord id.* at 270. This right is constitutionally required *in addition to* the welfare recipient's right to "present[] his own arguments and evidence orally." *Id.* at 267-68. The Court explained that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269; *see also id.* at 270 (explaining that the Court has zealously protected the rights of confrontation and cross-examination, not only in criminal cases but also in all types of cases where administrative actions were under scrutiny).

The panel and state court decisions here are directly contrary to the rule of law articulated in *Goldberg*. Whether Mr. Carty was to be committed against his will was undeniably an important decision, and it turned on questions of fact; thus, under *Goldberg*, he had the right to confront and cross-examine the State's witnesses rather than have their unsworn and untested out-of-court statements admitted against

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commitment proceeding from the State to Mr. Carty. He was not obligated to rectify the State's failure to meet its burden of proof under procedures comporting with due process by calling the very witnesses the State should have produced.

him. Moreover, terminating welfare benefits affects a lesser private interest than does taking away a citizen's liberty and confining him in a mental hospital against his will for two or more years. As with *Gault*, the panel decision makes no mention of *Goldberg* despite Mr. Carty's reliance on the precedent throughout briefing and at oral argument.[10]

D. The Panel's Reference to *Kansas v. Hendricks* Is Inapposite Because That Decision Dealt With Different Constitutional Issues From Those Presented Here.

The panel's reference to dicta from this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), App. 19a-20a, is inapposite to this case. *Hendricks* addressed whether the definition of "mental abnormality" in Kansas's SVPA satisfied "substantive" due process requirements, and whether the petitioner's commitment violated double jeopardy or *ex post facto* protections—different constitutional issues from those presented here. Whether the procedures provided by the Kansas statute or applied in that case complied with due process was not before the Court.

In fact, the defendant received "the right to present and cross-examine witnesses" under the Kansas SVPA, *Hendricks*, 521 U.S. at 353, and that statute appears to have required that the evidentiary rules applicable to criminal cases be applied to civil commitment proceedings, *see* Kan. Stat.

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[10] The panel decision states that Mr. Carty has not identified any Supreme Court case imposing an obligation on the State "to proffer only live testimony." App. 21a. This reflects a fundamental misunderstanding of *Vitek*, *Gault*, and *Goldberg*, and of the concept of confrontation. Of course, this does not mean the State is precluded from proffering any documentary evidence whatsoever, and Mr. Carty has never taken that position.

Ann. § 59-29a07 (1994). To prove its case, the State called three of Hendricks's victims as witnesses to testify as to the facts surrounding the earlier sexual conduct for which he was convicted. 521 U.S. at 355 n.2. One of these witnesses was called to testify about the facts underlying a conviction that occurred nearly 40 years earlier. *Id.* at 354, 355 n.2. The State also called the defendant's stepdaughter and stepson to testify about events that occurred approximately 20 years earlier. *Id.* at 354-55 & n.2. Thus, Hendricks was afforded his right to confrontation and cross-examination.[11]

In stark contrast to *Hendricks*, in Mr. Carty's case the State elected not to call a single witness to present sworn, live testimony as proof that "substantial sexual conduct" had occurred, and the trial court, over Mr. Carty's objection, allowed it to do so. Instead, the State sought to prove that fact through unreliable, multiple-hearsay documentary evidence that, absent the language of the SVPA, would never have been admitted. Indeed, the trial court refused to admit the police report, yet based on the SVPA's language admitted and relied on the equally, if not more, unreliable probation report, despite the prosecutor's explanation that the probation report was "frankly a regurgitation of the police report"—"a repeat of the police report and a summary of the police report." App. 91a. Mr. Carty was thus denied his right to confrontation and cross-examination.

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[11] Members of this Court have explained that "criminal law-type procedures . . . can serve an important purpose that in this context one might consider noncriminal namely, helping to prevent judgmental mistakes that would wrongly deprive a person of important liberty." *Id.* at 380-81 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

II. The Ninth Circuit's Erroneous Decision Affects Potentially Hundreds of Civil Commitment Hearings Every Year.

The Ninth Circuit's decision is far-reaching, affecting potentially hundreds of civil commitment hearings every year. Since the first "sexually violent predator" (SVP) statute was enacted, by Washington State in 1990, sixteen other states have adopted similar statutes. Wash. State Inst. for Pub. Policy, *Involuntary Commitment of Sexually Violent Predators: Comparing State Laws* 1 (2005), *available at* http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf. As of December 2004, 3,493 individuals nationwide had been involuntarily held for evaluation or committed for treatment. *Id.* Within the Ninth Circuit, where Washington, Arizona, and California each have such a statute (including the California SVPA at issue in this case), 1,047 individuals had been involuntarily committed as of that date. *Id.* at 3-5. In California, 539 people have been involuntarily committed under the SVPA to date. Cal. Dep't of Mental Health, *Sex Offender Commitment Program (SOCP): All Cases as of 03/01/2006* (2006), http://www.dmh.ca.gov/socp/pdf/box_2006/BoxScore_06-03-01.pdf. Since the California SVPA went into effect in 1996, District Attorneys have initiated 1,084 proceedings, 846 of which, like the proceeding against Mr. Carty, have moved beyond the probable cause stage and gone to trial. *Id.* The Ninth Circuit's decision in this case affects defendants' due process rights at not only every California SVPA trial but also every trial under the Washington and Arizona SVP statutes.

Additionally, the Ninth Circuit's reasoning, if not its holding, arguably extends beyond involuntary commitment proceedings under SVP statutes and applies to general involuntary commitment proceedings, thereby making the

impact of its error even greater. According to a recent American Bar Association study, in the States within the Ninth Circuit, there are 5,319 involuntary civil commitments *each year*. ABA Comm'n on Mental and Physical Disability Law, *National Survey of Adult Involuntary Civil and Forensic Commitments* 5, http://www.abanet.org/disability/statebystate.pdf (last visited Mar. 3, 2006) (compiling statistics for Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington). Nationwide, there are 133,649 involuntary civil commitments annually. *Id.*

The Ninth Circuit's erroneous decision has far-reaching effects on the constitutionality of proceedings which determine whether the State may commit citizens against their will. The decision therefore merits review by this Court.

III. The Decisions Below Will Discourage Pretrial Plea Bargains and Instead Force Defendants to Confront and Cross-Examine Victims at Criminal Trials.

Leaving the decisions in this case undisturbed will discourage pretrial plea bargains in criminal cases and force criminal defendants to insist on confronting and cross-examining victims at trial. The California Supreme Court's decision in *People v. Otto*, 26 P.3d 1061 (Cal. 2001), which the Ninth Circuit panel found "enlightening," App. 20a, only reinforces this conclusion.

In *Otto*, the court held that admitting victim hearsay statements at the defendant's SVPA hearing to prove details of his prior sex offenses did not violate his due process rights. In the underlying criminal proceeding, Otto pleaded no-contest to four crimes. But in contrast to Mr. Carty, "[i]n so doing, [Otto] stated the factual basis for his plea was contained in the police reports. Thus, . . . Otto's plea admitted the truth of the victims' statements." *Otto*, 26 P.3d

at 1068; *accord id.* at 1063. The *Otto* court appeared to assume that whenever there is a conviction, "some portion, if not all, of the alleged conduct will have been already either admitted in a plea or found true by a trier of fact after trial," which that court believed to be "[t]he most critical factor demonstrating the reliability of the victim hearsay statements." *Id.* at 1068. That assumption is incorrect, as Mr. Carty's case demonstrates. Here, as in many cases, Mr. Carty agreed to a plea deal instead of going to trial, and admitted no specific conduct, let alone the truth of the victims' statements, in connection with his plea.

The decisions below in this case effectively provide an incentive for criminal defendants to go to trial to disprove anticipatorily facts such as "substantial sexual conduct"—although they may otherwise be able to reach a plea bargain with prosecutors, and although those factual issues may be irrelevant to the particular offense—years before a civil commitment hearing that only hypothetically may take place. Even defendants who plead will have to challenge assertions in presentence reports, demanding evidentiary hearings and forcing witnesses to appear (even though there might not be any reason to do so given a negotiated plea deal), lest the State be able to use the witnesses' out-of-court statements years later in civil commitment proceedings. Two members of the *Otto* court, though concurring in the judgment in that case, warned of this:

> [The] provisions [under California law allowing a criminal defendant to challenge details in a probation report by submitting a statement in mitigation or presenting additional facts] seldom are relevant when a defendant enters into an agreement to plead guilty in exchange for the prosecution's recommendation that the defendant receive a particular sentence. In this

> situation, the defendant has little, if any, incentive to challenge particular statements contained in the presentence report. Indeed, . . . the purpose of such plea agreements often is to avoid requiring that the victims testify at trial. . . . A prosecutor might decide to withdraw a plea agreement if the defendant chooses to [challenge information contained in a presentence report or present other evidence in mitigation of the punishment to be imposed]. Thus by concluding that hearsay statements in presentence reports are reliable because the defendant can challenge them before sentencing (or because the defendant could have cross-examined the declarants by going to trial), the majority effectively will discourage some defendants from entering into plea agreements and encourage them instead to cross-examine individuals who made the statements appearing in the reports. Such an effect thwarts—rather than furthers—the purposes underlying Welfare and Institutions Code section 6600, subdivision (a)(3).

Otto, 26 P.3d at 1072-73 (George, C.J., joined by Kennard, J., concurring in judgment and dissenting in part).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56766

[Filed October 17, 2005]

JIMMY D. CARTY, Petitioner-Appellant,	)
v.	)
CRAIG NELSON, Warden; BILL LOCKYER, Attorney General, Respondents-Appellees.	)

Appeal from the United States District Court
for the Southern District of California
D.C. No. CV-01-00721-IEG/JFS
Irma E. Gonzalez, District Judge, Presiding

Before: Harry Pregerson, Raymond C. Fisher, and Jay S. Bybee, Circuit Judges.

OPINION

PREGERSON, Circuit Judge:

In April 1991, California prisoner Jimmy D. Carty ("Carty") pled guilty to seven counts of Committing a Lewd and Lascivious Act Upon a Child Under the Age of 14, in violation of California Penal Code section 288(a). Carty was sentenced to state prison for a term of sixteen years. Eight years later — a day before Carty was to be released on parole — the San Diego County District Attorney filed a civil commitment petition against Carty pursuant to California's Sexually Violent Predators Act ("SVP Act").

Consequently, in June 1999, a civil commitment hearing was conducted in San Diego Superior Court to determine whether Carty was a sexually violent predator ("SVP") who required civil commitment for a period of two years. After this hearing, Carty was classified as an SVP likely to engage in sexually violent criminal behavior against others, and ordered civilly committed in Atascadero State Hospital.

Carty appealed his June 1999 civil commitment to the California Court of Appeal and the California Supreme Court. Both courts ruled against Carty.

In May 2001, near the end of Carty's first civil commitment term, the San Diego County District Attorney petitioned for Carty's re-commitment. The District Attorney was successful in re-committing Carty to a second two-year term in October 2001.

In April 2003, while Carty was serving his second term, Carty filed a *pro se* habeas petition under 28 U.S.C. § 2254 in federal district court challenging his initial June 1999 civil

commitment. Carty contended that his Sixth Amendment right to confront witnesses and his Fourteenth Amendment due process rights were violated at the June 1999 commitment hearing because the superior court relied on inadmissible hearsay consisting of victim statements contained in Carty's probation report.

In May 2003, while review of Carty's federal habeas petition was pending in district court, the San Diego County District Attorney initiated another civil commitment proceeding in state court to re-commit Carty for a third term. This time, the District Attorney was unsuccessful in re-committing Carty. Specifically, in October 2003, a jury found that Carty should no longer be civilly committed under the SVP Act. Accordingly, the superior court ordered Carty to be immediately released from civil commitment.

Shortly before his release from civil commitment, the district court denied Carty's pending habeas petition with prejudice. Carty now appeals the district court's order denying his habeas petition. We have jurisdiction under 28 U.S.C. § 2253(a), and as discussed below, we deem the controversy live, reach the merits, and affirm.

I. FACTS AND PROCEDURAL HISTORY

A. California's Sexually Violent Predators Act

California's SVP Act requires that a prisoner who was previously convicted of certain enumerated violent sex crimes be evaluated by the Department of Corrections, the Board of Prison Terms, and the California Department of Mental Health six months before being released from prison to determine whether the prisoner may be a potential SVP. *See* Cal. Welf. & Inst. Code § 6601(a)(1). This screening involves

review of the prisoner's background and criminal record. *See id.* § 6601(b). If the Department of Corrections concludes that the prisoner is likely to be an SVP, the prisoner is referred to the Department of Mental Health for a "full evaluation" to determine whether the prisoner meets the other criteria in the SVP Act. *See id.*

This full evaluation must be conducted in accordance with a standardized assessment protocol by at least two practicing psychiatrists or psychologists designated by the Department of Mental Health. *See id.* § 6601(c) & (d). The two evaluators must agree that the prisoner has a mental disorder and is dangerous within the meaning of section 6600 for proceedings to go forward under the SVP Act.[1] *See id.* § 6601(d). If the two evaluators agree that the prisoner should be civilly committed under the SVP Act, the Department of Mental Health will then transmit a request for a petition for commitment to the county in which the alleged SVP was convicted. At that time the Department of Mental Health will also send the county copies of the psychiatric evaluations prepared by the evaluators and any other supporting documentation. *See id.* § 6601(d), (h), & (i).

"If the county's designated counsel [either the district attorney or county counsel] concurs with the recommendation, a petition for commitment shall be filed in the [county's]

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[1] If the two Department of Mental Health evaluators disagree whether the statutory criteria are present, "two independent professionals" must be selected and "further examination" of the alleged SVP must be conducted. *See* Cal. Welf. & Inst. Code § 6601(e); *see also id.* § 6601(f) & (g). "[A] petition to request commitment . . . shall only be filed if both independent professionals . . . concur that the person meets the criteria for commitment . . . ." *Id.* § 6601(f).

superior court . . . ." *Id.* § 6601(i). Once the petition for civil commitment is filed in the superior court by the county's designated counsel, a superior court judge will then hold a "probable cause hearing." *Id.* § 6602(a). At this hearing, the prisoner is entitled to assistance of counsel.

The superior court judge will determine at the hearing whether there is probable cause to believe that the prisoner is likely to engage in sexually violent, predatory criminal behavior after being released from prison. *See id.* If the judge determines there is no probable cause, the judge shall dismiss the petition for commitment. If, however, the judge determines that probable cause exists, the judge must order the prisoner to remain in custody pending a civil commitment trial to determine whether the prisoner is, by reason of a diagnosed mental disorder, a danger to the health and safety of others and likely to engage in acts of sexual violence upon release from prison.

Despite the fact that the commitment trial is civil in nature, the prisoner is nonetheless "entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports." *Id.* § 6603. If the prisoner is indigent, then she or he is entitled to court-appointed counsel and court-appointed experts. If the prisoner or county's designated counsel do not demand a jury trial, a bench trial will be conducted. *Id.* § 6603(e). The court or jury shall determine whether, beyond a reasonable doubt, the prisoner is a sexually violent predator. *Id.* § 6604. A unanimous verdict is required in any jury trial. *Id.* § 6603(f). "If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term

for which he or she was initially sentenced." *Id.* But if the court or jury determines following a trial that the person is a sexually violent predator, then the prisoner is deemed an SVP and civilly committed for two years in a facility designated by the California Department of Mental Health. *See id.* § 6604. The SVP is then committed to the custody of the Department of Mental Health "for appropriate treatment and confinement in a secure facility . . . ." *Id.*

An SVP may not be civilly committed for more than two years unless a new petition for commitment is filed and a subsequent re-commitment is obtained pursuant to the same safe-guards detailed above. *See id.* Once every year, the civilly committed SVP has a right to a "show cause" hearing to determine whether her or his condition has changed such that she or he no longer poses a danger to others. *See id.* § 6605. If the superior court at the show cause hearing determines that the SVP's condition has changed, then another hearing is held by the court to permit the State to show that the SVP remains a danger to others. Again, if the prisoner or county's designated counsel do not demand a jury trial, a bench trial will be conducted to determine whether the SVP remains a danger to others. If the court or jury finds in favor of the civilly committed SVP, then the person must be released. If, however, the court or jury finds in favor of the State, the person is re-committed for two more years. *See id.* §§ 6605, 6608.

B. Carty's Underlying Criminal Offenses and Subsequent Civil Commitment as an SVP

In April 1991, Carty entered into a plea agreement on seven counts of Committing a Lewd and Lascivious Act Upon a Child Under the Age of 14, in violation of California Penal Code section 288(a). Carty admitted that two of the offenses

involved sexual contact against his sons. Carty's guilty plea on the remaining five counts was entered pursuant to *People v. West*, 3 Cal. 3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970). This meant that Carty did not admit the specific details about his conduct on the remaining five counts when he pled guilty. *See In re Alvernaz*, 2 Cal. 4th 924, 8 Cal.Rptr.2d 713, 718, 830 P.2d 747 (1992) (stating that a plea proffered under *People v. West* is a plea of *nolo contendere* that does not admit a factual basis for the plea). After Carty entered his guilty plea, a probation report was prepared. The probation report relied on and summarized police reports that contained statements from the victims and their parents. Carty was sentenced to sixteen years in state prison.

In April 1999, one day before Carty was to be released on parole, the San Diego County District Attorney filed a petition with the San Diego Superior Court to have Carty civilly committed for a period of two years under the SVP Act. To civilly commit Carty as an SVP, the District Attorney needed to prove beyond a reasonable doubt that: (1) Carty had two predicate crimes involving "substantial sexual conduct;"[2] (2) Carty had a mental disorder which made him a danger to others; and (3) Carty was likely to re-offend on account of his

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[2] "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." Cal. Welf. & Inst. Code § 6600.1. In this case, all of the "substantial sexual conduct" involved masturbation. California courts have determined that "masturbation under the [SVP Act] encompasses any touching or contact, however slight, of the genital of either the victim or the offender, with the requisite intent . . . ." *People v. Chambless*, 74 Cal. App. 4th 773, 88 Cal.Rptr.2d 444, 451 (1999).

mental disorder. *See* Cal. Welf. & Inst. Code §§ 6600(a)(1), 6604.

On April 30, 1999, Carty appeared before the superior court and waived his right to a probable cause hearing. The superior court scheduled another hearing for June 23, 1999, and ordered Carty to be returned to custody. When Carty returned to the superior court, he waived his right to a jury trial.

On June 24, 1999, a civil commitment hearing was held before Superior Court Judge Norbert Ehrenfreund to determine whether Carty was an SVP who required civil commitment. No witnesses were called, and the case was decided by the superior court judge solely on documentary evidence. Carty's counsel did not object to admission of the reports prepared by the State's mental health experts as evidence that Carty had two predicate crimes involving "substantial sexual conduct" (the second element) and that Carty had a mental disorder that made him a danger to others (the third element). Carty's counsel, however, contested the admission of the probation report as proof that Carty's conduct in two of his *West* offenses involved "substantial sexual conduct" (the first element). Carty objected to the use of the probation report because he contended that it contained inadmissible hearsay.

Notwithstanding Carty's objections, the superior court judge admitted the probation report into evidence. The probation report provided the crucial evidence for the state court to conclude that Carty's acts in two of his *West* offenses amounted to "substantial sexual conduct." On the basis of this finding, the superior court ruled that Carty was an SVP and ordered him to be civilly committed for two years. Carty appealed his two-year civil commitment first to the California

Court of Appeal, and then to the California Supreme Court.

C. Carty's California Appellate Proceedings

In his appeal to the California Court of Appeal, Carty contended that the superior court judge erred in civilly committing him as an SVP in June 1999. According to Carty, he should not have been deemed an SVP because (1) the probation report used at his initial commitment hearing was based on multiple levels of hearsay and therefore inadmissible, and (2) the admission of the probation report at the commitment hearing violated his Sixth Amendment right to confront the witnesses against him and his Fourteenth Amendment due process rights.

The California Court of Appeal rejected Carty's hearsay argument on the basis that California Welfare and Institution Code section 6600(a) is a statutory hearsay exception that permits documentary evidence to be used to prove the details underlying the commission of an offense that led to a prior conviction.[3] The court also concluded that because the SVP Act entails a civil, and not a criminal, proceeding, the Sixth

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[3] "Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. *The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health.*" Cal. Welf. & Inst. Code § 6600.1 (emphasis added).

Amendment right to confront witnesses does not attach. Finally, the California Court of Appeal held that Carty's due process rights were not violated because Carty had the ability to call witnesses and to challenge the accuracy of the probation officer's report. According to the California appellate court, the civil commitment proceeding did not violate Carty's due process rights to confrontation and cross-examination, and the procedures and safeguards prescribed by the SVP Act meet due process standards.

After this unfavorable decision, Carty sought review by the California Supreme Court. On July 19, 2000, the California Supreme Court summarily denied Carty's request for review. Following his failures in the California State Courts, Carty filed a *pro se* habeas petition in the United States District Court for the Southern District of California.

D. Carty's Federal Habeas Proceedings

On April 23, 2001, while Carty was serving his initial two-year term imposed by the San Diego Superior Court in June 1999, he filed a *pro se* federal habeas petition, challenging his June 1999 civil commitment. Carty argued that the superior court violated his Sixth Amendment right to confront the witnesses against him and his Fourteenth Amendment due process rights by relying on inadmissible hearsay to conclude that his conduct was "substantial sexual conduct."

On May 3, 2001, while Carty's habeas petition was pending before the district court — but before the two-year term of his June 1999 commitment expired — the San Diego County District Attorney initiated a second civil commitment proceeding against Carty in superior court. On October 29,

2001, Carty was once again adjudged to be an SVP and ordered re-committed to a second two-year term.

While Carty was serving his second civil commitment term, United States Magistrate Judge James F. Stiven filed his report pursuant to 28 U.S.C. § 636(b)(1) on February 10, 2003, recommending that Carty's federal habeas petition be denied. Carty filed objections to the Magistrate Judge's Report and Recommendation. On May 23, 2003, the San Diego County District Attorney initiated a third commitment proceeding against Carty in San Diego Superior Court before the second two-year term for Carty's October 2001 re-commitment expired.

While the San Diego County District Attorney's May 2003 re-commitment petition was pending in state court, District Judge Irma E. Gonzalez conducted a *de novo* review of Carty's objections to the Magistrate Judge's Report and Recommendation. On July 31, 2003, the district court filed an order adopting the Magistrate Judge's Report and Recommendation and denied Carty's habeas petition.[4] The district court concluded that habeas relief was not warranted. According to the district court, the California Court of Appeal's decision that Carty was not denied his due process rights when the superior court relied on his probation report to civilly commit him was not contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

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[4] In its order, the district court also granted a Certificate of Appealability "as to the claim that during the civil commitment hearing, the state court improperly considered the facts underlying the five counts to which petitioner pled guilty pursuant to *People v. West*."

On October 24, 2003, after the district court denied Carty's habeas petition, a commitment hearing was held in superior court on the San Diego County District Attorney's pending re-commitment petition. This hearing was to determine whether Carty should be re-committed for a third two-year term. Following the hearing, a jury unanimously determined that Carty was no longer an SVP, and the superior court ordered Carty unconditionally released from civil commitment the same day.

Although he is no longer civilly committed as an SVP, Carty, through appointed counsel, now appeals the district court's denial of his habeas petition which challenged his initial civil commitment. Carty argues that had the district court granted his habeas petition, then his initial civil commitment (in June 1999) and his second re-commitment (in October 2001) would have been nullified, and as a result, he would not need to verify his residency and employment every ninety days, as required by the California SVP Act. *See* Cal. Penal Code § 290(a)(1)(E) ("Every person who has ever been adjudicated a sexually violent predator . . . shall, after his or her release from custody, verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer . . . .").

II. ANALYSIS

A. The Case is Not Moot

Before we consider the merits of Carty's petition, we must determine "whether it presents a case or controversy under Article III of the Constitution." *Jackson v. Ca Dep't of Mental Health*, 399 F.3d 1069, 1071 (9th Cir. 2005); *see also Caswell v. Calderon*, 363 F.3d 832, 836 (9th Cir. 2004) ("A

case is moot if it does not satisfy the case-or-controversy requirement of Article III, § 2, of the Constitution.").

> The case-or-controversy requirement demands that, through all stages of federal judicial proceedings, the parties continue to have a personal stake in the outcome of the lawsuit. This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.

Caswell, 363 F.3d at 836 (citations and quotation marks omitted). Upon release, "some concrete and continuing injury other than the now-ended incarceration or parole — some 'collateral consequence' of the conviction — must exist if the suit is to be maintained." *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). Here, the San Diego County District Attorney contends (1) that Carty has been released from civil commitment and there is no collateral consequence as a result of his *prior* adjudication as an SVP; and (2) that even if there is a collateral consequence, a favorable judicial decision will not provide Carty with redress. As discussed below, we disagree with both contentions.

1. Collateral Consequences Exist

As an SVP, Carty must verify his address and place of employment every ninety days with the California Department of Justice. According to the State, this obligation to merely "verify" residency and employment information every ninety days under California Penal Code section 290(a)(1)(E) does not meet the case or controversy requirement of Article III because this obligation is independent of Carty's civil

commitment as an SVP. *See* Cal. Penal Code § 290(a)(1)(A) (requiring lifetime registration of specified sex offenders). We disagree.

Carty's injury is continuing and actual because, as a former SVP, he is subject to incarceration for up to a year if he fails to verify his residence and employment record every ninety days. *See* Cal. Penal Code § 290(a)(1)(E) & (g)(5). This amounts to an injury in fact. *See Jackson*, 399 F.3d at 1073 (stating that the continuing effects of commitment may be significant enough to satisfy the injury in fact requirement for standing, and a decision invalidating the state court's order would remedy those continuing effects). Thus, we conclude that Carty is suffering a concrete and continuing injury sufficient to satisfy Article III's case or controversy requirement.

2. Relief is Available

Because Carty is no longer committed under the June 1999 initial civil commitment order that he challenged in his habeas petition, the State contends that we cannot provide Carty with any meaningful relief. This is not true.

Carty first argues that our decision in *Hubbart v. Knapp*, 379 F.3d 773 (9th Cir. 2004), controls as to whether his appeal is moot. There, the State argued that Hubbart's claim that his commitment under the SVP Act violated his constitutional rights was moot because Hubbart petitioned for habeas relief from his initial term of confinement, which had expired. We held that Hubbart's petition was *not* moot because his claims were capable of repetition yet evading review. *See id.* at 777-78 (noting that a two-year commitment under the SVP Act is too short a time for the validity of the commitment to be fully litigated). We stated that an action is

capable of repetition yet evading review when: "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Id.* at 777 (citation and internal quotation marks omitted). However, in this case, unlike *Hubbart*, Carty cannot show that the claim in his habeas petition challenging the validity of his June 1999 initial civil commitment is capable of repetition yet evading review: in October 2003, Carty was released after a jury determined, beyond a reasonable doubt, that he was no longer an SVP and should not be re-committed for a third term.

Carty next contends that the second re-commitment proceeding in October 2001 was tainted because the San Diego County District Attorney was not required to prove "substantial sexual conduct" a second time, but merely relied on the finding from the June 1999 initial civil commitment hearing. In essence, Carty argues (1) that the District Attorney could not have legally moved to re-commit him in October 2001 absent the earlier unconstitutional June 1999 initial civil commitment; and (2) that the District Attorney was not required to re-prove at the October 2001 hearing that he perpetrated "substantial sexual conduct" on his child victims. Consequently, Carty states that our court could allow him, if necessary, to seek leave from the district court to amend his April 2001 federal habeas petition to challenge the second re-commitment in October 2001 on the same grounds as he currently challenges his initial civil commitment in June 1999.

Carty's second argument has merit. Although Carty's instant appeal challenges only his June 1999 initial civil commitment proceeding, if we conclude that the state court's finding of "substantial sexual conduct" at the June 1999

hearing was unconstitutional, then Carty's October 2001 hearing would also be unconstitutional. Put another way, if we find Carty's due process argument persuasive, we can strike both the June 1999 civil commitment and the October 2001 re-commitment, and relieve Carty from the additional reporting requirements placed on an SVP. Accordingly, Carty's appeal is not moot because we *could* grant him relief.

B. Carty's Sixth Amendment Right to Confrontation and Fourteenth Amendment Due Process Rights Were Not Violated

During Carty's civil commitment proceedings before the San Diego Superior Court, the San Diego County District Attorney used documentary evidence that included hearsay to prove that Carty engaged in "substantial sexual conduct" against his child victims. Carty contends that the district court erred in denying him habeas relief because the District Attorney's use of this documentary evidence violated his constitutional rights. With the demanding standards governing federal habeas relief under 28 U.S.C. § 2254 in mind, we address the merits of Carty's appeal, and conclude that the district court did not err in denying Carty habeas relief.

1. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petition cannot be granted unless a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" Supreme Court precedent if the state court (1) arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) confronted facts that are materially

indistinguishable from relevant Supreme Court precedent but arrived at an opposite conclusion. *See Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). An "unreasonable application" of Supreme Court law occurs when "the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413; *see also Powell v. Galaza*, 328 F.3d 558, 563 (9th Cir. 2003) ("The state court need not cite or even be aware of the governing Supreme Court cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.") (internal quotation marks omitted). Subject to these limitations, we review *de novo* the district court's denial of a habeas petition, *see Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005), looking to the "last reasoned decision" by a state court, *see Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), which in this case is the California Court of Appeal's unpublished opinion.

2. Carty's Sixth Amendment Rights

Carty points out that in June 1999 the San Diego County District Attorney used documentary evidence — as permitted by the SVP Act — to prove that he was an SVP who required civil commitment. Carty then argues that he was deprived of his Sixth Amendment right to confront his accusers (child victims) in court, to have them testify under oath, and to cross-examine them on the documentary evidence that contained their statements that he had engaged in "substantial sexual conduct" against them. This argument fails because the commitment proceedings under the SVP Act are civil, not criminal.

The "fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal

prosecution' for purposes of the Sixth Amendment." *Middendorf v. Henry*, 425 U.S. 25, 37, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976). We recognize that involuntary civil commitment "constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). But the Sixth Amendment right to confrontation does not attach in civil commitment proceedings. *Cf. United States v. Sahhar*, 917 F.2d 1197, 1205-06 (9th Cir. 1990) ("Federal commitment serves a regulatory, rather than punitive, purpose and section 4246 [permitting civil commitment of mentally incompetent prisoners due for release] need not incorporate the right to a jury trial."). Indeed, "the procedures required for a civil commitment are not nearly as rigorous as those for criminal trials, or even juvenile proceedings." *Id.* at 1206 (internal citations omitted). We therefore reject Carty's argument that his Sixth Amendment rights were violated during his initial civil commitment proceeding in June 1999.

3. Carty's Fourteenth Amendment Due Process Rights

As originally enacted, the SVP Act did not permit the use of documentary evidence. The California State Legislature, however, modified the SVP Act "after prosecutors complained that they must bring victims back to court to re-litigate proof of prior convictions." *People v. Otto*, 26 Cal. 4th 200, 109 Cal. Rptr. 2d 327, 333, 26 P.3d 1061 (2001) (citation and internal quotation marks omitted).

Carty argues that his substantive due process rights were violated when the San Diego County District Attorney used — as permitted by the SVP Act — documentary evidence to prove that Carty engaged in "substantial sexual conduct" with his child victims. Specifically, Carty complains that the

superior court improperly admitted statements from his victims (ages five through fourteen) as memorialized in his probation report. In addition, Carty argues he was not given the same protections as California residents facing general civil commitment proceedings. In short, Carty claims that his constitutional rights were violated when unreliable documentary evidence was used against him during his civil commitment proceedings under the SVP Act.

To analyze Carty's due process challenge, we first look to *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), where the Supreme Court decided whether Nebraska violated a prisoner's due process rights by transferring him from prison to a state mental hospital for treatment. The Court held that in order to satisfy due process, a prisoner facing involuntary commitment to a mental hospital is entitled to: (1) written notice; (2) a hearing at which the evidence being relied upon for the commitment is disclosed to the prisoner; (3) an opportunity at the hearing for the prisoner to be heard in person, to present testimony and documentary evidence, and to cross-examine witnesses called by the State; (4) an independent decision-maker; (5) reasoned findings of fact; (6) legal counsel; and (7) effective and timely notice of these rights. *See id.* at 494-97.

Next we look to the Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), where the Court considered a substantive due process challenge to the Kansas SVP Act. *See id.* at 356. The Court rejected Hendrick's challenge and stated that "we have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Id.* at 357. The Court noted that "the numerous procedural and evidentiary protections afforded" a potential SVP did "not transform a

civil commitment proceeding into a criminal prosecution," but rather demonstrated that the Legislature had "taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards." *Id.* at 364-65. In the end, the Court held that the Kansas SVP Act comported with due process requirements and entailed civil and not criminal proceedings for constitutional purposes. *Id.* at 370-71.

In addition to these decisions, the California Supreme Court's opinion in *Otto* is enlightening. In *Otto*, the California Supreme Court concluded that the SVP Act procedures, including its statutory hearsay exception, did not violate a defendant's right to due process. *See Otto*, 109 Cal.Rptr.2d at 334-38. Otto challenged the use of child victim statements contained in a probation report that were used to establish "substantial sexual conduct" in his SVP Act civil commitment proceedings. Like Carty, Otto argued that the victim statements did not possess "sufficient indicia of reliability to satisfy due process." *See id.* at 335. The California Supreme Court disagreed, and noted that although Otto pled no contest, the factual basis for his plea was contained in the police reports which detailed the predicate offenses. *See id.* The California Supreme Court also noted that Otto received the probation report prior to his sentencing on the predicate offenses and did not challenge its contents when he entered his guilty plea before the state trial court. *See id.* at 336-37. Carty, like Otto, received his probation report prior to being sentenced in April 1991 for the predicate offenses and did not challenge the contents of the probation report.

As to Otto's confrontation claims, the California Supreme Court noted that Otto did not attempt to call any witnesses of his own, and that Otto had the opportunity to confront his child victims at the time the underlying criminal charges were

filed, "but instead chose to accept a plea bargain." *Id.* at 338. Similarly, Carty decided in April 1991 to accept a plea bargain as to the seven counts of lewd acts against children instead of confronting these witnesses at the time the underlying charges were filed.

In light of *Vitek*, *Hendrick*, and the persuasive opinion in *Otto*, we reject Carty's current due process challenge.[5] First, before being civilly committed under the California SVP Act, Carty was accorded all of the procedural protections identified in *Vitek* during his June 1999 initial civil commitment hearing.

Second, Carty fails to identify any Supreme Court case which imposes an obligation on the San Diego County District Attorney to proffer only live testimony at civil commitment hearings under the SVP Act. In these hearings, the superior court needs to find facts relating to the circumstances of sex offenses which are predominantly committed in private. Because of the incentive for defendants to enter into plea agreements, many of the facts underlying sex offenses are not determined by a trier of fact in a criminal proceeding. This means that the main witnesses at a sex offense trial usually are the victim and the offender. That is why, unlike other civil commitment proceedings, the SVP Act's special hearsay

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[5] Carty argues that section 6600(a)(3) violates the Equal Protection clause. To succeed in this argument, Carty must demonstrate that section 6600(a)(3) does not survive rational basis review. *See, e.g., Board of Trustees v. Garrett*, 531 U.S. 356, 366-67, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). Relieving victims from the onus of testifying in SVP Act civil commitment proceedings about the trauma they suffered clears the rational basis hurdle. *See Otto*, 109 Cal.Rptr.2d at 333. Thus, we conclude that Carty's Equal Protection argument fails.

exception "intends to relieve victims of the burden and trauma of testifying about the details of the crimes." *Otto*, 109 Cal.Rptr.2d at 333. Carty argues that the admission of the victims' statements in the probation report was fundamentally unfair. He wants the government — at the civil commitment proceedings under the SVP Act — to put on its case by bringing in live witnesses instead of using documentary evidence contained in the probation report so that he can cross-examine the child victim witnesses. But instead of accepting a plea bargain eight years earlier, Carty could have gone to trial and confronted the child victim witnesses. His waiver of a trial and his failure to challenge the content of the victims' statements in the probation report at the time of his sentencing undercuts this argument in light of the reasoning in *Otto*. Furthermore, the documentary evidence used by the superior court during Carty's initial civil commitment hearing in June 1999 possessed sufficient indicia of reliability to meet California's statutory hearsay exception. *See* Cal. Welf. & Inst. Code § 6600.1 ("The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health."); *Cf. E.B. v. Verniero*, 119 F.3d 1077, 1108-09 (3rd Cir. 1997) ("The prosecutor may base her case entirely on hearsay, if it shows indicia of reliability."). In fact, the superior court gave Carty the opportunity to challenge the documentary evidence contained in his probation report at his initial civil commitment hearing in June 1999. Equally important, during Carty's June 1999 initial civil commitment hearing, the superior court carefully evaluated a medical report and all of the victim statements contained in the probation report, and concluded that only two of the five acts committed by Carty against the child victims

involved conduct that constituted "substantial sexual conduct."

Finally, even looking to the Supreme Court cases on which Carty relies, he was not denied the necessary safeguards required by the Constitution. Particularly, at his initial civil commitment hearing in June 1999, Carty was represented by counsel, was given an opportunity to challenge the evidence used by the District Attorney, waived his right to a trial by a jury, and was adjudged, beyond a reasonable doubt, as an SVP who required civil commitment. *See, e.g., Addington*, 441 U.S. 418 at 432-33, 60 L. Ed. 2d 323 (holding that "to meet due process demands," the standard of proof for civil commitment proceedings must be higher than the preponderance-of-the-evidence standard); *Humphrey v. Cady*, 405 U.S. 504, 508-14, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972) (concluding that an evidentiary hearing was warranted when an individual was committed after his prison sentence allegedly without a jury trial, without counsel, and without an opportunity to challenge "the initial determination that his crime was sexually motivated"); *Baxstrom v. Herold*, 383 U.S. 107, 111-12, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966) ("For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.").

"Due process calls for an individual determination before someone is locked away." *Demore v. Kim*, 538 U.S. 510, 551, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003). That is what happened here.

III. CONCLUSION[6]

The California Court of Appeal's conclusions that the admission of documentary evidence during Carty's June 1999 civil commitment hearing (1) did not render his civil commitment proceedings under the SVP Act fundamentally unfair, and (2) did not violate his substantive due process rights, was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. Accordingly, we **AFFIRM** the district court's order denying Carty's habeas petition.

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[6] The State's August 9, 2004, request for judicial notice of certain state court documents is granted.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56766

[Filed December 15, 2005]

JIMMY D. CARTY,	)
Petitioner-Appellant,	)
	)
v.	)
	)
CRAIG NELSON, Warden;	)
BILL LOCKYER, Attorney General,	)
Respondents-Appellees.	)
	)

Appeal from the United States District Court
for the Southern District of California
D.C. No. CV-01-00721-IEG/JFS
Irma E. Gonzalez, District Judge, Presiding

Before: Harry Pregerson, Raymond C. Fisher, and Jay S. Bybee, Circuit Judges.

ORDER AMENDING OPINION AND DENYING THE PETITIONS FOR REHEARING AND REHEARING EN BANC

At *Carty v. Nelson*, 426 F.3d 1064, 1071, change "the San Diego County District Attorney contends" to "the State contends."

With this amendment, the panel has voted to deny the Appellant's petition for panel rehearing and for rehearing en banc, and the panel voted to deny the Appellee's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions filed by both parties for panel rehearing and for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 01CV0721-IEG (JFS)

[Filed July 31, 2003]

JIMMY D. CARTY,	)
Petitioner,	)
	)
v.	)
	)
CRAIG NELSON, Warden,	)
Respondent.	)
	)

ORDER (1) ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION; (2) DENYING WITH PREJUDICE PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 § 2254; AND (3) GRANTING A LIMITED CERTIFICATE OF APPEALABILITY

[Doc. Nos. 1, 23.]

INTRODUCTION

On September 17, 2001, petitioner Jimmy D. Carty ("petitioner"), a state prisoner proceeding *pro se*, filed a

petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The case was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636 (b)(1)(B) and Local Rule HC.2(a). On February 10, 2003, Magistrate Judge James F. Stiven filed a Report and Recommendation ("Report") recommending the petition be denied. Petitioner filed objections to the Magistrate Judge's Report on February 25, 2003. For the reasons stated below, the Court: (1) adopts the Magistrate Judge's Report and (2) dismisses petitioner's § 2254 petition with prejudice, but (3) grants petitioner a certificate of appealability.

BACKGROUND

Procedural history

On April 24, 1991, petitioner pied guilty to seven counts of Committing a Lewd and Lascivious Act Upon a Child Under the Age of 14 Years, in violation of California Penal Code section 288(a). (Lodgment #1, 1 Clerk's Transcript ("CT") at 2.) Petitioner was charged with committing these acts upon seven different victims, and he admitted to two counts of substantial sexual conduct with two children with whom he was in a position of trust (his biological sons). (*Id.*) With respect to the remaining five counts, petitioner pled guilty without admitting the facts alleged, pursuant to *People v. West*, 3 Cal.3d 595 (1970). (1 CT at 2.) The state court subsequently sentenced petitioner to a prison term of 16 years.

The San Diego County District Attorney filed for civil commitment of petitioner under California's Sexually Violent Predator Act ("SVPA"), Cal Welf. & Institutions Code § 6600, et seq on April 23, 1999. (Lodgment #1, 1 CT at 1.) Petitioner was in custody at that time and scheduled to be

released on parole on April 24, 1999. (Objection to Report and Recommendation ("Objection") at 1.) The state trial court granted the petition for civil commitment based on the finding that petitioner was a sexually violent predator and a danger to the health and safety of others. (Lodgment #1, 1 CT at 119.) Petitioner was ordered to be committed for two years to the Department of Mental Health, Atascadero State Hospital, and his commitment is subject to renewal indefinitely. (Lodgment #1, 2 Order at 121 (citing Cal. Welfare and Institutions Code §§ 6600-6604)). Petitioner filed an appeal of the finding of civil commitment on December 15, 1999 in the California Court of Appeal. (Report at 3). The Court of Appeal affirmed the lower court's commitment order on June 12, 2000, and the California Supreme Court summarily denied the petition for review on July 19, 2000. (*Id.*) On April 23, 2001, petitioner filed the instant petition for Writ of Habeas Corpus. Respondent filed an answer to the petition on July 23, 2001. Magistrate Judge James F. Stiven granted petitioner's application to file a late traverse; petitioner filed a traverse on May 28, 2002.

On February 10, 2003, Magistrate Judge Stiven filed a Report recommending the petition be denied. Petitioner filed objections to Magistrate Judge Stiven's Report on February 25, 2003.

The Magistrate Judge's Report began by setting forth the proper standard of review for disposition of the instant petition. The Court may grant petitioner's § 2254 petition only if the Court determines that the California Court of appeal[1] decided petitioner's appeal in a manner that was

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[1] As noted above, the California Supreme Court rejected petitioner's petition for review without any analysis or citation of authority. Accordingly, as the Magistrate Judge explains, this Court

"contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 403, 412-13 (2000).

The Magistrate Judge then made recommendations that: 1) the federal habeas court cannot review petitioner's evidentiary claims related to state law questions; 2) the Sixth Amendment right to confrontation of witnesses does not extend to civil commitment hearings, and 3) petitioner's due process rights were not violated because he had sufficient opportunity to examine, confront, and cross-examine opposing witnesses, though he waived his right to do so.

Petitioner objects to the Report and Recommendation, arguing that his petition has merit based on the following alleged violations of federal law: (1) evidence admitted in his civil commitment hearing was inadmissible in violation of due process; (2) evidence admitted in his civil commitment hearing was improper hearsay in violation of due process; (3) the trial court relied upon hearsay in violation of his right to confrontation of witnesses; (4) he was held unlawfully because the District Attorney filed an untimely petition in violation of due process, (5) double jeopardy; and (6) res judicata. The Court will review *de novo* those portions of the Report and Recommendation to which Petitioner objects. *See* 28 U.S.C. § 636 (b)(1)(B) and Local Rule HC.2(d).

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must look to the decision of the California Court of Appeal to determine whether the final "reasoned state court decision" is contrary to, or unreasonably applies U.S. Supreme Court law.

DISCUSSION

The Court finds initially that petitioner's objections contain several distinct claims, some exhausted and others unexhausted. Claims four, five, and six were not raised before the state courts. The result is that the instant petition is "mixed," with three exhausted and three unexhausted claims.

Notwithstanding the total exhaustion rule, federal courts may deny a habeas petition despite a petitioner's failure to fully exhaust state judicial remedies. *See* 28 U.S.C.A. § 2254(b)(2) (West Supp. 2002); *Liegakos v. Cooke*, 106 F.3d 1381, 1388 (7th Cir. 1997). "[I]t appears that in a mixed petition context, the Court can reach the merits of the unexhausted claims only if it denies on the merits the entire petition, including the exhausted claims." *Johnson v. Scully*, 967 F. Supp. 113, 116 (S.D.N.Y. 1997) (discussing § 2254(b)(2)). The Court finds, for reasons stated below, that the entire petition should be dismissed on the merits. Therefore, the Court will proceed to examine the merits of all of petitioner's claims in turn, including those which have not been exhausted.

1. First Alleged Due Process Violation: Use of inadmissible evidence

Petitioner pled guilty to two counts of violations of the California Penal Code and five additional counts of lewd acts upon children pursuant to the doctrine originating in *People v. West*, 3 Cal. 3d 595 (1970). Because petitioner pled guilty in this manner to the latter five counts, he did not explicitly admit to the conduct alleged in those five counts. *See id.* at 613-14 (holding that plea bargains are generally acceptable when disclosed to the trial court and incorporated in the record). Petitioner contends these five additional counts were

improperly used during his civil commitment hearing. In essence, petitioner argues that because his plea agreement did not require him to explicitly admit to a factual basis for the five additional counts, there was no factual basis to those five counts to support a later finding of civil commitment.[2]

However, before a court can enter judgment upon a guilty plea, the court must be satisfied with the factual basis for the plea.[3] Fed. R. Crim. P. 11(f); Cal P.C. § 1192.5. Therefore, although petitioner did not explicitly admit to the five additional counts, the state court found a factual basis for petitioner's guilty pleas. (*People v. Carty*, Case No. CR 122000, F137565 (April 24, 1991) (Entry of Guilty Plea, Reporter's Transcript, DA#B8482001 at 10.)).[4] Furthermore, during the civil commitment hearing, the state superior court did not rely upon the *fact* that petitioner pled guilty to the five

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[2] During the sentencing portion of the civil commitment trial, the court admonished the District Attorney's office to refrain from taking *People vs. West* pleas "because they do not help the court at a later time such as this in determining what occurred." Notwithstanding this warning, the court accepted the probation report, sentencing statements, and psychological evaluations pursuant to the California Welfare & Institutions Code Section 6600, which allows for the admission of documentary evidence that might otherwise be inadmissible. (Reporter's Appeal Transcript, Court of Appeal of the State of California, 4th Dist., Case No. CR 122000 (June 24, 1999) at 12). The court *sua sponte* takes judicial notice of this transcript.

[3] The purpose of the court's inquiry into the guilty plea is to ensure that a defendant is not mistakenly pleading guilty. *McCarthy v. United States*, 394 U.S. 459, 467 (1969). *See also United States v. Keiswetter*, 866 F.2d 1301 (10th Cir. 1989).

[4] The court *sua sponte* takes judicial notice of this transcript.

additional counts. (*People v. Carty* No. D033778 (May 11, 2000), Lodgment #5 at 8.) Rather, the court based the finding of civil commitment entirely upon submitted documents; specifically, the court examined the probation report, sentencing statements, and psychological evaluations from the petitioner's 1991 convictions. *Id.* The State court's use of these documents to establish petitioner's predicate offenses is appropriate under the SVPA, which states that, "the details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, probation and sentencing reports, and evaluations...." Cal. Welf. & Inst. Code § 6600(a)(3). Because petitioner's civil commitment was predicated upon the probation report and psychological evaluations, and the state court found a factual basis for the offenses described, the Court finds that petitioner has failed to show that admission of evidence relating to the five additional counts violated his federal due process rights.

2. Second Alleged Due Process Violation: Use of inadmissible hearsay

Petitioner further contends the use of probation reports was inadmissible hearsay, and court's reliance on such reports violated his rights to due process of law. To support these claims, petitioner cites *Goomar v. Centennial Life Insurance*, a case involving a disputed insurance claim for disability benefits. 855 F. Supp. 319, 320 (S.D. Cal. 1994). In *Goomar*, the plaintiff doctor claimed that his psychological disability (seeing visions of astral beings) led to his medical license being revoked. *Id.* He sought offered into evidence testimony from psychiatrists who examined him close to the trial date and speculated about the existence of a psychotic condition roughly ten years earlier. *Id.* at 326. The court

determined that "[r]etrospective expert testimony regarding the existence or onset of a mental illness is inadmissible speculation." *Id.* *Goomar* is inapplicable to the instant case for two reasons. First, the presentence reports used in the instant case, which contain an examination of petitioner's state of mind at the time and prognoses for his future, are distinguishable from the testimony in *Goomar*, which consisted of speculation about whether the defendant had a mental illness in the past. The prognoses in the instant case are distinct from conjecture about the existence of a mental illness years before the psychiatric examination took place. Second, *Goomar* does not address the procedures of the SVPA, and therefore does not pertain to the case at hand.

Furthermore, as the Magistrate Judge found, habeas review requires deference to the state courts' findings based on state law. (Report at 18 (citing *Fuller v. Roe*, 182 F.3d 699, 703 (9th Cir. 1999)).) In *Fuller v. Roe*, the Ninth Circuit found that, "the admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result denies a fundamentally fair trial guaranteed by due process." 182 F.3d at 703 (*overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473, 482 (2000)). Similarly, in *Estelle v. McGuire*, the Supreme Court found that the state appellate court's interpretation of the California Evidence Code was not subject to habeas review unless the alleged error is so significant that a resulting conviction would violate due process. 502 U.S. 62, 72 (1991).

Petitioner further contends that the admission of hearsay evidence rose to the level of a due process violation. However, in *People v. Otto*, a case in which Otto had pled no contest to the underlying charges and had subsequently been civilly committed, the California Supreme Court found that

use of presentence reports at Otto's civil commitment hearings was admissible hearsay under the SVPA. 26 Cal.4th 200, 206-207. Furthermore, the admission of presentence reports generally does not violate due process so long as the hearsay statements contain sufficient indica of reliability. *Id.* at 209-210. "The most critical factor demonstrating the reliability of victim hearsay statements is that Otto [the petitioner] was convicted of the crimes to which the statements relate." *Id.* at 211. The court found that this factor will always be present in a habeas review of a civil commitment under the SVPA, such as in the instant case. *Id.* The hearsay admitted in petitioner's civil commitment hearing possessed sufficient indica of reliability and met a statutory hearsay exception. Therefore, the admission of these hearsay statements did not constitute a denial of petitioner's due process rights to a fundamentally fair trial.

3. Right to confrontation of witnesses

Petitioner contends that his right to confront witnesses was violated. (See Obj. 3:22-24). However, the Magistrate Judge's Report correctly notes that a civil commitment proceeding is distinct from a criminal proceeding. (See Report at 18-19 (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997))). Thus, the Sixth Amendment right to confrontation, which pertains to "criminal prosecutions," does not apply. U.S. CONST., amend. VI. The Supreme Court has recognized a procedural due process right to confrontation in civil proceedings under the Fourteenth Amendment. See *Willner v. Committe on Character and Fitness*, 373 U.S. 96, 103-104 (1963).

In the instant case, the Magistrate Judge and the California Court of Appeal found that petitioner had the opportunity to call witnesses and challenge the accuracy of the reports used

by the state court. (Report at 19.) The Court has reviewed the record and agrees with the determination that petitioner's right to the confrontation of witnesses, under both the Sixth and Fourteenth Amendments, was not violated. Thus, the Court finds that petitioner's objection is unfounded.

4. Unlawful custody[5]

Petitioner contends that he was not in lawful custody when the District Attorney filed for civil commitment. He alleges that there was no record of a petition for civil commitment under California's SVPA filed with the Department of Corrections before he was released from custody on April 24, 1999. (Objection at 1:21-28) The Magistrate Judge found that the District Attorney filed a civil commitment petition on April 23, 1999, one day before Petitioner's scheduled release, pursuant to the SVPA. (Report at 2:16-19). California Welfare & Institutions Code § 6601.2 states:

> A petition may be filed under this section if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed. A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law. This paragraph shall apply to any petition filed on or after January 1, 1996.

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[5] The remaining claims (unlawful custudy, double jeopardy, and res judicata) are claims that petitioner raised in his objections to the Magistrate Judge's report.

The record confirms that the petition for civil commitment was filed the day before petitioner's scheduled release. (Lodgment #1, 1 CT at 1). Therefore, petitioner's claim that he was not in lawful custody when the petition was filed has no merit.[6]

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[6] Petitioner further alleges a violation of his 14th Amendment right to Due Process in that after the expiration of his original prison term, he was held unlawfully under a "72 hour parole hold" for longer than 72 hours. (Objections at 2:1-7). This objection was not raised in petitioner's traverse or previous petition, so the Magistrate Judge did not evaluate it. Furthermore, petitioner did not raise this claim in state court, so it is an unexhausted claim.

On April 23, 1999, the San Diego County District Attorney filed a petition for civil commitment. (Lodgment #1, 1 CTat 1.) Petitioner was in custody at that time and scbeduled to be released on parole on April 24, 1999. (Objections at 1.) On April 30, 1999, petitioner waived his right to a probable cause hearing, and the trial date was set for June 23, 1999. (Minutes of the Court, 1 Ct at 124.) Petitioner could be lawfully held for those six days after his prison term expired under the SVPA, which allows a prisoner to be held for up to ten days before a probable cause hearing. CA Welf. and Inst. Code § 6601.5.

Furthermore, even had there been undue delay in hearing petitioner's case, provided that there is notice and an opportunity to be heard, delay of a hearing time is not a due process violation. *Hewitt v. Helms*, 459 U.S. 460, 476 (1983). *See also Bostic v. Carlson*, 884 F.2d 1267 (9th Cir. 1989) (holding that habeas petitionerwas not denied due process when a hearing was postponed twice and occurred within eight days of the incident that provoked the hearing); *Carter v. Fairman*, 675 F. Supp. 449, 451 (N.D. Ill. 1987) (holding that due process merely requires that a hearing be held within a "reasonable" amount of time). Petitioner fails to present a legal theory under which he can demonstrate a violation of due process. He merely states that he was held unlawfully under a "72 hour parole hold," although the SVPA provided for petitioner to be in custody during that time, and has failed to allege supporting

5. Double Jeopardy

Petitioner contends that his civil commitment proceeding violated double jeopardy because he had previously been convicted of the criminal offenses that formed the basis for his civil commitment. (Obj. at 3:3-5.) The Constitutional prohibition against double jeopardy applies when a person is "subject for the same offense to be twice put in jeopardy of life or limb." *Kansas v. Hendricks*, 521 U.S. 346, 369. However, the Supreme Court has found that a civil commitment proceeding following a criminal conviction does not constitute a second prosecution because it is not criminal in nature. *Id.* at 361 (citing *Jones v. United States*, 463 U.S. 354 (1983)). *See also Baxstrom v. Herold*, 383 U.S. 107 (1966) ("civil commitment could follow the expiration of a prison term without offending double jeopardy principles."); *People v. Chambless*, 88 Cal. Rptr. 2d 444, 446 n.2 (Cal. Ct. App. 1999) ("[I]t is well settled that double jeopardy and cruel and unusual punishment principles do not apply to civil commitment proceedings because they are not penal in nature."). Civil and criminal trials are distinct in that criminal trials have two primary objectives: retribution and deterrence. *Hendricks* at 347. California's SVPA, like the Kansas Sexually Violent Predator Act analyzed by the Supreme Court, lacks those objectives and instead involves restraint of the mentally ill until their illnesses are no longer a threat to others. *Compare Id.* at 347, *with* California

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facts that would establish how this detention denied him due process by prejudicing him during his civil commitment hearing.

Finally, even assuming for the sake of argument that petitioner was held unlawfully, but under a good faith mistake of fact or law, under Cal. Welf. & Inst. Code § 6601.2, his petition must still be dismissed. Petitioner has failed to allege bad faith on the part of those responsible for holding him in custody.

Welfare and Institutions Code § 6602. Therefore, a civil commitment proceeding is distinct from a criminal proceeding, and petitioner's claim of double jeopardy must fail.

6. Res Judicata

Petitioner argues that using the facts presented at his criminal trial during his civil commitment hearing "violates res judicata." (*See* Objections at 3:3-4) Res judicata is the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits...constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." *Black's Law Dictionary* 1305 (6th ed. 1990). Thus, the principle behind res judicata is that a court should not re-litigate a case that has already been adjudged. The Supreme Court has found that res judicata does not apply to a civil case that relates to a prior criminal case because civil and criminal actions have different requirements of proof. *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*."). Therefore, the doctrine of res judicata does not require a finding that petitioner's civil commitment hearing, which utilized facts presented at the criminal trial, was improper.[7]

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[7] Petitioner also provided the court with a citation noting that equal protection applies to criminal and civil suits. (*See* Objections at 3:19-21). However, because he failed to present allegations of how he has been denied equal protection of the laws of the United States, petitioner has not stated a cognizable claim upon which the Court can rule. *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984)

CONCLUSION

Based on the foregoing, the Court, having reviewed *de novo* the Magistrate Judge's Report, ADOPTS the recommendation in full, and DENIES petitioner Jimmy D. Carty's petition for a writ of habeas corpus pursuant to § 2254. However, the Court GRANTS petitioner a certificate of appealability as to the claim that during the civil commitment hearing, the state court improperly considered the facts underlying the five counts to which petitioner pled guilty pursuant to *People v. West*. *See* 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

Dated: July 31, 2003 /s/_____
IRMA E. GONZALEZ
United States District Judge

APPENDIX D

IN THE SUPREME COURT OF CALIFORNIA

No. S089116

[Filed July 19, 2000]

THE PEOPLE,
Respondent,

v.

JIMMY D. CARTY,
Appellant.

On Appeal From
Court of Appeal, Fourth Appellate District
Division One - No. D033778

Petition for review DENIED.

/s/ _____
Chief Justice

APPENDIX E

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

No. D033778
(Super. Ct. No. CR122000)

[Filed May 11, 2000]

THE PEOPLE,	)
Plaintiff and Respondent,	)
	)
v.	)
	)
JIMMY D. CARTY,	)
Defendant and Appellant.	)
	)

APPEAL from a judgment of the Superior Court of San Diego County, Norbert Ehrenfreund, Judge. (Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed.

Jimmy D. Carty appeals from a judgment ordering his two-year commitment to the custody of the State Department of Mental Health (DMH) following a jury finding he is a sexually violent predator (SVP) within the meaning of the

Sexually Violent Predator's Act (the Act) (Welf. & Inst. Code,[1] § 6600 et seq.). Carty contends the Jury's determination should be set aside because there was insufficient evidence to show he had previously been convicted of two or more Act qualifying sexually violent offenses, the court erred in admitting hearsay evidence contained in a probation report and psychological evaluations, and that the admission of hearsay evidence authorized by the Act violated his right to confrontation. We affirm.

BACKGROUND

I

Summary of the Act

Although our Supreme Court in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 (*Hubbart*) has provided a thorough review of the statutory scheme comprising the Act (*see id.* at pp. 1143-1149), for the convenience of the reader, we repeat pertinent provisions relevant to the issues in this case.

The Act, which is contained in sections 6600 et seq., provides for continued confinement in the custody of the DMH of those persons identified as SVP's before they have completed their prison or parole revocation terms. It defines an SVP as "a person who has been convicted of a sexually violent offense against two or more victims for which he or

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[1] All statutory references are to this code unless otherwise stated.

she received a determinate sentence[2] and who has a diagnosed mental disorder[3] that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a).)

If the Department of Corrections (DOC) determines the inmate approaching sentence completion may be an SVP, it refers him or her for evaluation to see if the inmate falls under the Act. (§ 6601, subds. (a)(1), (b), (c) & (d).) When the evaluation reveals the inmate has suffered the required qualifying prior convictions (§§ 6600, subds. (a), (b), 6600.1) and two licensed psychologists and/or psychiatrists agree the

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[2] "A 'sexually violent offense' refers to certain enumerated sex crimes 'committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.' (§ 6600, subd. (b), citing Pen. Code, §§ 261, subd. (a)(2) [rape of nonspouse], 262, subd. (a)(1) [rape of spouse], 264.1 [rape in concert], 286 [sodomy] , 288, subds. (a) & (b) [lewd acts upon children under age 14], 288a [oral copulation], 289, subd. (a) [sexual penetration by foreign object].)" (*Hubbart, supra,* 19 Cal.4th at p. 1145.) Further, "[I]f the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14 and the offending act or acts involved substantial sexual conduct, the offense shall constitute a 'sexually violent offense' for purposes of Section 6600." (§ 600.1, subd. (a).)

[3] Although a "diagnosed mental disorder" is not fully defined under the Act, such condition is stated to "include[] a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).)

inmate "has a diagnosed mental disorder such that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody," the DMH transmits a request for a petition for commitment under the Act to the county in which the alleged SVP was last convicted, with copies of the evaluation reports and other supporting documents. (§ 6601, subds. (d), (h) & (i).) If a designated county's attorney concurs in the request, a petition for commitment is filed in that county's superior court. (§ 6601, subd. (i).)

Once filed, the superior court holds a hearing to determine whether there is "probable cause" to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.[4] (§ 6602, as amended by Stats. 1996, ch. 4, § 4, and by Stats. 1998, ch. 19, § 3, ch. 961, § 4.) The Act defines "predatory" as "an act directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (§ 6600, subd. (e).) If probable cause is found, the judge "shall" order that a trial be conducted "to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release . . . ." (§ 6602, subd. (a).)

The person subject to a trial under the Act is to remain in custody in a secure facility until the trial is completed. (§ 6602, subd. (a).) That person is entitled to trial by jury, the

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[4] The alleged SVP is entitled to the assistance of counsel at this hearing. (§ 6602.)

assistance of counsel, the right to retain experts or professional persons to perform further evaluations, and access to relevant medical and psychological reports. (§ 6603, subd. (a).) The trier of fact must determine beyond a reasonable doubt whether the person named in the petition is in fact an SVP. (§ 6604.) If the person is determined to be an SVP, he or she shall be committed to the custody of the DMH for two years "for appropriate treatment and confinement in a secure facility . . . ," subject to annual review and extension of commitment if the diagnosed mental disorder and the consequent danger to the community persists. (§§ 6604, 6605.) "[T]he person shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a new petition for commitment under [the Act] . . . ." (§ 6604.)

II

FACTUAL SUMMARY

Carty waived his right to a jury trial and submitted his case to the court based only on documents. We summarize here the content of the materials reviewed by the court.

A. Predicate Offenses

On April 21, 1991, Carty pled guilty to seven counts of lewd acts upon children (Pen. Code, § 288, subd. (a)), and admitted that as to two acts committed involving his biological sons, the acts constituted substantial sexual conduct (Pen. Code, § 1203.066, subd. (a)(8)). Carty's guilty pleas as to five remaining counts were entered pursuant to *People v. West* (1970) 3 Cal.3d 595. Accordingly, Carty did not make

express admissions as to the conduct in such counts. Carty was sentenced to a 16-year term.[5]

The probation report lists the victims of the remaining counts by number. We list both the number and the first names for clarity.

Victim 3 was 8-year-old Brandon S. During an overnight visit at Carty's house, Carty repeatedly grabbed Brandon's genital area over his clothing. This conduct lasted several hours during which Carty refused to stop even though Brandon objected to the touching.

While 6-year-old Chad H. (victim 4) played with Carty's children Carty touched Chad's "front private" numerous times both under and over his clothing.

Five-year-old Chase A. (victim 5) was subjected to Carty pulling his shorts, pinching his penis and biting his "private" which Chase described as his upper thigh. Carry admitted he pinched Chase's penis.

Victim 6, 7-year-old Sean S., reported that Carty touched his "private part" over his clothing while he watched television in Carty's home.

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[5] The offenses involving Carty's own children were not considered by the court as "predatory offenses" within the meaning of the Act, but were considered in the psychological reports in the assessment of Carty's mental condition. Since these were not predicate offenses to determine whether Carty committed the requisite predatory offenses we will not summarize the facts of those offenses here.

Fourteen-year-old Michael (victim 7) was molested three times by Carty during the summer of 1990. Carty caressed Michael's leg and repeatedly grabbed his "private part" over his clothing.[6]

III

DISCUSSION

A. Hearsay Evidence

The trial in this case was conducted entirely on submitted documents. Specifically, the court admitted the probation report from the 1991 convictions and various reports of psychological evaluations of Carty pursuant to the Act. Carty does not challenge the admissibility of the expert reports, but does challenge the use of the probation report. Carty contends the report includes multiple levels of hearsay and is therefore inadmissible. He further argues that even if the report is admissible the use of the materials contained within it violates his right to confrontation. We will reject both arguments.

In order to establish that a person is an SVP it is necessary to prove the qualifying prior offenses. *(In re Parker* (1998) 60 Cal.App.4th 1453, 1467.) Since the qualifying predatory offenses are not, by statute, violent sex offenses, the prosecution must show there was substantial sexual conduct during those offenses. The plain language of the Act permits the use of documentary evidence, including hearsay within those documents to prove the conduct underlying the

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[6] Since Carty does not challenge either the admissibility or the sufficiency of the psychological evidence to show he is an SVP as described in the Act, we will omit any summary of that evidence.

qualifying offenses. *(People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 152-154 (*Howard*).)

Section 6600, subdivision (a) provides in part: "[t]he existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, probation and sentencing reports, and evaluations by the [DMH]."

It is thus clear that the Act contemplates proof of the details of prior crimes can be by hearsay contained in documents. *(In re Parker, supra,* 60 Cal.App.4th at pp. 1467-1470; *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1076-1077.)

Carty acknowledges the Act specifically allows probation reports to be used for the purpose of proving the details of prior offenses. He argues, however, such cannot be used unless there is a recognized exception to each level of hearsay. He contends that the reference to police and medical reports contained in the probation report, which demonstrate the nature of his conduct, are inadmissible, notwithstanding the language of the Act.

We reject this contention. The Act clearly authorizes the use of the material admitted by the trial court in this case. The court excluded police reports offered by the prosecution because they were not specifically authorized by the Act, and they do not have the same indicia of reliability as a probation report. The trial court reasoned, and we agree, that the probation report was the subject of potential challenge at the time of sentencing. Carty had both the opportunity and the

motivation to challenge any inaccuracies in that report. Therefore, the report in its final form carried greater reliability, justifying legislative acceptance on that type of document as a method of proof.

Carty's alternative challenge to the documentary evidence is based on his assertion he was denied his Sixth Amendment right to confrontation by the admission of hearsay. Again, we will reject Carty's argument.

We start our analysis with the observation that a proceeding under the Act is a civil proceeding and not a criminal case. Therefore the Sixth Amendment rights do not attach. On the other hand, a respondent in a civil proceeding, such as this, has a due process right to confront and cross-examine witnesses. (*Hubbart, supra,* (1999) 19 Cal.4th at pp. 1174-1175; *In re Malinda S.* (1990) 51 Cal.3d 368, 383, fn. 16.) Under a due process analysis we look to see if the method for challenge available to the respondent provides the benefits that derive from confrontation and cross-examination. *Howard, supra,* 70 Cal.App.4th at p. 154.)

Carty had the ability to call witnesses and to challenge the accuracy of the probation officer's report. He could have presented conflicting evidence on his own behalf in order to undermine the prosecution's case. (§ 6603.). Thus we agree with the court in *Howard, supra,* 70 Cal.App.4th 136, that the Act does meet due process standards in permitting the prosecution to go forward and prove the details of past crimes without having to bring back the victims to again prove the crimes against them. The legislative balance of interests is appropriate because it, like the procedure in *In re Malinda S., supra,* 51 Cal.3d 368, provides a respondent with a meaningful opportunity to attack the credibility of the

prosecution's evidence. The trial court did not err in admitting the probation report.

B. Sufficiency of the Evidence

Carty challenges the sufficiency of the evidence to show his acts committed on children other that his sons constituted substantial sexual conduct as required by the Act. (See § 6600.1, subds. (a) & (b); *People v. Superior Court (Johannes)* (1999) 70 Cal.App.4th 558, 566-568.) Where the act constitutes masturbation of the child it is substantial sexual conduct. (*People v. Chambless* (1999) 74 Cal.App.4th 773 (*Chambless*).)

When we review a challenge to the sufficiency of the evidence we apply the substantial evidence standard. Under that standard we review the entire record, drawing all reasonable inferences in favor of the decision of the trial court. We do not weigh the evidence nor do we make credibility judgments. We simply determine if, in light of all the evidence, a reasonable trier of fact could reach the conclusion reached in the matter before us. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 464-465.)

Applying the proper standards we are satisfied there is sufficient evidence to support the trial court's decision.[7]

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[7] The Attorney General argues the offense involving Carty's own children can be considered as predatory offenses. We decline to address that contention. The prosecution did not rely on such evidence nor did the trial court consider such offenses to be qualifying priors. Accordingly, we will not evaluate the evidence in this case based on matters not properly before the trial court.

Carty's conduct in grabbing the genitals of several children, both over and under the clothing constituted masturbation as it has been defined in section 6600.1, subdivision (b) and in our opinion in *Chambless, supra,* 74 Cal.App.4th 773. Carty recognizes our opinion is controlling in this case and that the conduct with the children, other than his own, constitutes substantial sexual conduct under *Chambless*. Carty argues *Chambless* was wrongly decided. We disagree.

We have again reviewed our opinion in *Chambless*, *supra*, 74 Cal.App.4th 773. The Supreme court has denied review. We remain satisfied with our analysis and will continue to follow it unless directed otherwise by a higher court.

DISPOSITION

The judgment is affirmed.

/s/ _____
HUFFMAN, J.

WE CONCUR :

/s/ _____
BENKE, Acting P.J.

/s/ _____
O, ROURKE, J.

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
CENTRAL DIVISION

No.CR 122000
DA B84820

[Filed October 31, 2001]

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,	)
v.	)
JIMMY D. CARTY, Respondent.	)

ORDER FOR CONTINUED INVOLUNTARY TREATMENT OF A SEXUALLY VIOLENT PREDATOR (Welf. & Inst. Code, §§ 6600 & 6604)

On April 24, 1991, in the Municipal Court of California, County of San Diego, San Diego Judicial District, in case F-137565 (Superior Court No. CR-122000), JIMMY D. CARTY, pled guilty to seven counts of Committing a Lewd and Lascivious Act Upon a Child Under the Age of 14 Years

involving seven victims, in violation of Penal Code section 288(a). JIMMY D. CARTY also admitted allegations that he did have substantial sexual conduct with a child under 11 years of age, within the meaning of Penal Code section 1203.066(a)(8), with two of the children. He further admitted allegations that he occupied a position of trust with two of the children and did have substantial sexual conduct with the child, within the meaning of Penal Code section 1203.066(a)(8). Respondent was thereafter sentenced to state prison for a term of 16 years.

On June 24, 1999, JIMMY D. CARTY was found to be a sexually violent predator within the meaning of Welfare and Institutions Code sections 6600 and 6604 and thereafter committed to the Department of Mental Health for a period of two years.

On May 3, 2001, a petition to extend respondent's commitment for an additional two years was filed by the People.

On October 25, 2001, after a trial by jury, respondent was found to still have a diagnosed mental disorder that makes him a danger to the health and safety of others, in that it is likely he will engage in sexually violent criminal behavior.

Now, therefore, IT IS HEREBY ORDERED that the respondent, JIMMY D. CARTY is hereby recommitted to the Department of Mental Health (Atascadero State Hospital) for a period of two years (until June 24, 2003) pursuant to the provisions of Welfare and Institutions Code section 6604.1.

IT IS FURTHER ORDERED that the Sheriff of the County of San Diego receive JIMMY D. CARTY into his custody and transfer him to Atascadero State Hospital,

Atascadero, California, at his earliest opportunity, and there deliver said respondent into the custody of the medical director of said hospital, to be kept pursuant to this commitment until such time as he is no longer a danger to the health and safety of others, or until the maximum term of commitment pursuant to this order is completed, whichever is earlier, unless further action is taken to extend his commitment, at which time he shall be returned to this court for further proceedings in accordance with section 6600 et seq. of the Welfare and Institutions Code of the State of California.

Dated: OCT 29 2001

/s/_____
ROBERT J. TRENTACOSTA
Judge of the Superior Court

APPENDIX G

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
CENTRAL DIVISION

No.CR 122000
DA B84820

[Filed June 24, 1999]

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)
v.	)
JIMMY D. CARTY, Defendant.	)

ORDER FOR COMMITMENT OF A PERSON FOUND TO BE A SEXUALLY VIOLENT PREDATOR (TRANSPORTATION ORDER)
(Welfare & Institutions Code 6604)

The above-entitled case was set for hearing/trial on the People's petition for the commitment of the defendant to the State Department of Mental Health as a sexually violent predator.

At the trial:

The Court made the following finding:

> The defendant, by reason of a diagnosed mental disorder, is a danger to the health and safety of others in that the defendant is likely to engage in acts of sexual violence upon his/her release from the California Department of Corrections or other secure facility.

The Court determined that the defendant is a sexually violent predator.

> The People's petition was granted. The defendant is committed to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health for a term of two years pursuant to WI 6604.

IT IS ORDERED that the Sheriff of San Diego County shall transport the defendant to the Atascadero State Hospital, and that the Medical Director of that institution shall receive custody of the defendant for the purpose of the commitment ordered pursuant to WI 6604.

The defendant is remanded to the custody of the Sheriff of San Diego County without bail, until such time as the Sheriff shall transport the defendant to the institution designated at the Sheriff's earliest convenience.

The formal commitment order, as prepared by the District Attorney, shall follow by mail.

Date: Jun 24 1999 /s/_____

Norbert Ehrenfreund
Judge of the Superior Court

APPENDIX H

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO
DEPARTMENT 39

CASE NO. CR 122000

[June 24, 1999]

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)
v.	)
JIMMY D. CARTY, Respondent.	)

BEFORE HON. NORBERT EHRENFREUND, JUDGE

REPORTER'S TRANSCRIPT

[p.1]

The Court: Good morning. Good morning, everyone.

Ms. Flaherty: Good morning.

Mr. Cohan: Good morning, Your Honor.

The Court: Good morning, Mr. Carty.

The Respondent: Good morning.

The Court: This is the matter of the People of the State of California versus Jimmy Carty. Mr. Carty is present in court.

Is that right, sir?

He's here with his attorney, Mr. Stephen Cohen. Ms. Katherine Flaherty is here representing the People.

And we are here by way of a petition filed by the district attorney for the involuntary treatment of a sexually violent predator and pursuant to the *Welfare & Institutions Code*; that's section 6600 and these other sections. The district attorney has petitioned this court to begin proceedings to determine whether Jimmy Carty should be committed to the state department of mental health for two years on the reason -- for the reason that he has been convicted of a sexually violent offense against two or more victims, that he has received a determinate sentence, and that he has a mental disorder that makes him a danger to the health and safety of others and that it is likely he will engage in sexually violent criminal behavior.

Mr. Carty, you have a right to a jury trial as to whether this is true or not true, whether you are a [p.2] sexually violent predator or not. Do you understand that?

The Respondent: Yes.

The Court: Now, your attorney has indicated to me that you wish to give up your right to a jury trial on this question and submit this matter -- have this matter tried before a judge -- that is me -- sitting alone. Is that right?

The Respondent: Yes.

The Court: Is that what you want to do?

The Respondent: Yes.

The Court: All right. Okay. In order to do that then, I have to ask you a number of questions, okay? Can you stand and raise your right hand?

The Bailiff: Your Honor, he's handcuffed to the chair.

The Court: Just raise your right hand.

(Whereupon, the Respondent is sworn.)

The Clerk: Thank you.

Please state your full name for the record and spell your last name.

The Respondent: Jimmy David Carty, C-A-R-T-Y.

The Court: All right. Mr. Carty, have you had enough time to discuss this matter of waiving jury with your attorney?

The Respondent: I believe so, yes.

The Court: Have you told your attorney -- explained [p.3] to him and has he explained to you the procedure of having a jury trial? Have you discussed that with him?

The Respondent: Yes.

The Court: And it is my understanding that as a result of that discussion and your own thinking you personally wish to give up your right to a trial by jury and have the matter tried before me sitting alone; is that correct?

The Respondent: Yes.

The Court: Do you know what a jury trial is?

The Respondent: I've never been to one, but I have an idea.

The Court: How many people are on a jury?

The Respondent: Twelve.

The Court: That's right. Where do they come from?

The Respondent: I think from the streets basically.

The Court: From the community -- from the community, yes, from the community of San Diego County. You understand that, right?

The Respondent: Yes.

The Court: And do you understand that in a jury trial you'd have a chance through your attorney to pick and choose the persons that you want to sit on your jury? Do you understand that?

The Respondent: Yeah.

The Court: And do you understand that in a jury trial it's still the law --

Isn't it, Counsel --

[p.4]

That at a jury trial on this issue it would have to be a unanimous verdict by proof beyond a reasonable doubt?

Is that right, Counsel?

Mr. Cohan: Yes, it is.

Ms. Flaherty: Yes, Your Honor.

The Court: So do you understand that if you had a trial by jury, all twelve jurors would have to be convinced beyond a reasonable doubt that you are a sexually violent predator, as I have defined it? Do you understand that?

The Respondent: I'm sure.

The Court: They all have to be convinced beyond a reasonable doubt. Do you understand that?

The Respondent: Yes.

The Court: So if just -- if eleven of them were convinced but one said, "well, I think he probably is, but I can't say I'm convinced beyond a reasonable doubt," if that was the situation, then they could not find you to be a sexually violent predator. Do you understand that?

The Respondent: Yes.

The Court: It has to be unanimous. All right.

And do you understand that at a jury trial, why, you'd have a -- you'd have the right to remain silent; you don't have to say anything; you have no burden of proof; that you have a right to be confronted by any witnesses against you. You have a right at a jury trial to present evidence on your behalf. You could have the Court subpoena any witnesses that you want subpoenaed and brought in. You [p.5] can present any evidence you wish as long as it's admissible evidence at a jury trial. And you understand that? I want you to understand what you're -- the nature of a jury trial, okay?

The Respondent: All right.

The Court: In other words, you'd have a right to a full and fair trial before a jury of your peers. Do you understand that?

The Respondent: Yes.

The Court: Okay. Now, I'm not asking you to give up these other rights, such as the right to remain silent and the right to be confronted by any witnesses against you; I'm not asking you to give up those rights or to give up the right to

present evidence on your behalf; you have those rights whether you have a jury trial or a trial before a judge, but do you now give up your right to a jury trial in this -- in this matter?

The Respondent: Yes.

The Court: Do you join in that, Mr. Cohan?

Mr. Cohan: I do.

The Court: Do the People join in that?

Ms. Flaherty: Yes, Your Honor.

The Court: Okay. Now, have you had any -- are you taking any medicine at the present time?

The Respondent: Different -- yeah, different medications, yeah.

The Court: Do they affect your judgment in any way?

The Respondent: No. I've been taking them for years [p.6] now, so . . . .

The Court: They don't affect your judgment?

The Respondent: No.

The Court: They don't prevent you from knowing where you are and what you're doing here?

The Respondent: No.

The Court: You're fully aware of where we are and what we're doing and what this is all about; is that right?

The Respondent: Yes.

The Court: Are you satisfied that he is fully alert and knows what's going on, Mr. Cohan?

Mr. Cohan: Yes, I am.

The Court: Okay. All right. Then the Court will find that Mr. Carty -- Well, let me ask you one other question.

Do you understand what the consequences are -- If you had a jury trial and the jury found that you were a sexually violent predator, do you know what the consequences of that would be if they found that you were a sexually violent predator?

The Respondent: The same as if you would.

The Court: Yes. Well, what is that?

The Respondent: I'd be committed for two years, and I'd have to keep coming back here until they decide otherwise.

The Court: You would be committed to the state department of mental health for two more years. Do you understand that?

[p.7]

The Respondent: That's just like prison, but go ahead.

The Court: Okay. You understand that's the consequences, right?

The Respondent: (no response.)

The Court: Is that right?

The Respondent: Yes.

The Court: Okay. Well, the Court will find then that Mr. Carty has made a knowing and intelligent waiver of his right to a jury trial in this matter. He understands the consequences of trying the case before a judge rather than a jury. He understands his rights to a jury trial and he's giving up those rights, and we will so find and we will order that the clerk enter that waiver of a jury trial in the minutes of the Court. Okay. The jury trial has been waived. The case will go forward with the judge sitting alone.

How do you wish to proceed, Mr. Cohan?

Mr. Cohan: Well, since there are these three criteria to be proven, my initial --

The Court: Is there any evidence going to be submitted?

Mr. Cohan: Well, the legal issue -- it was my original plan to raise the legal issue by a motion for summary judgment, and this concerns the substance of the first of the three criteria; that is, whether or not he has the predicate convictions of having committed sexually violent offenses against two or more victims.

[p.8]

Now, I believe that there is a defect in the petition. The petition alleges correctly that he has been convicted of seven counts of 288(a), and with respect to the first two of those counts that he was convicted of, I believe counts 1 and 25, he admitted that there was substantial sexual conduct, but the Court knows a predicate conviction for 288(a) must involve substantial sexual conduct or force and violence because 288(a) by itself is a nonforcible child molest; however, I believe that those two counts, those first two counts, do not meet the criteria because the relationship with them was manifestly not predatory; these were biological children of his own.

The Court: He pled guilty to counts 1 and 25, right?

Mr. Cohan: Yes.

The Court: Those counts of 1 and 25, as I recall, refer to the children Brian and Christopher?

Mr. Cohan: Yes.

The Court: And those are his children?

Mr. Cohan: Exactly.

The Court: And that's what he admitted to the judge, Judge Thompson, that there was substantial sexual conduct.

Mr. Cohan: Yes, sir.

The Court: Did he make that admission as to any others?

Mr. Cohan: No, he did not. In fact, I believe that the basis for the plea to the remaining counts was under *People vs. West*, that he was pleading guilty for the benefit of the plea bargain and did not make factual admissions with [p.9] respect to those other -- those five additional counts.

The Court: Okay.

Mr. Cohan: So I --

The Court: Do we have the issue before us of whether he has been convicted of crimes involving substantial sexual conduct ?

Mr. Cohan: Yes, and the -- as I see it, the preliminary issue is the evidentiary issue of the admissibility of evidence to prove up the underlying circumstances of those offenses, and I guess rather than litigate this through a pretrial motion method, an alternative would be to proceed to have the People offer their evidence and I could make my evidentiary objections in that form. I don't know how the Court wants to proceed.

The Court: I think that's all right.

Don't you?

Ms. Flaherty: Uh-huh, yes.

The Court: I think that's the best way.

Are you waiving any -- what about the witnesses?

Mr. Cohan: Well, the -- with respect to the proof of -- there are three criteria in order to find that a person meets the

-- the sexually violent predator law, and the first of the criteria are the requisite convictions. The second criteria -- that is what I'm calling the predicate offenses, two or more victims, sexually violent offenses -- the second criteria has to do with whether he has a mental disorder which makes him a danger; and the [p.10] third criteria is whether or not, by reason of that mental disorder, he is likely to reoffend with sexually dangerous conduct if he were released.

Now, typically in these trials, evidence as to the second two criteria are provided by expert witnesses, psychologists or psychiatrists. The Court has, by way of attachment to the petition, the People's -- the People's reports that have been prepared by these individuals who are hired by the department of mental health to do the evaluations. I am, in effect, waiving my hearsay objection to those reports and am permitting the Court to read those reports on the issue of the remaining two criteria. I believe that there are actually three -- three reports that are attached.

The statute says that he is to be evaluated by two psychologists or psychiatrists. In the case of a difference of opinion, then they are to appoint two more, and that's what happened in this case; there was a difference of opinion by the first two evaluators. One was positive that he met the criteria; one was negative. So two more evaluators did their evaluations and submitted both of their reports, and they concluded that he did meet the criteria.

Now, the People have attached the three reports that said that he meets the criteria. And just for the record, I will describe the fourth report that was not submitted. This is a report by a psychologist who is on the panel for the department of mental health under - for the [p.11] 6600 evaluations. Her name is Terry Quinn, Q-U-I-N-N, Ph.D.

She is a clinical psychologist and she concluded that -- wait a minute. I'm sorry. That' s -- I'm sorry. Quinn made a positive finding. The -- the report that I want to refer to was by Mary Jane Alumbaugh -- A-L-U-M-B-A-U-G-H -- Ph.D.

The Court: Spell that again, please.

Mr. Cohan: Mary Jane Alumbaugh, A-L-U-M-B-A-U-G-H, Ph.D., clinical psychologist, and she's from Santa Maria. She made the conclusion that Mr. Carty does not meet the criteria, and she found that based on the last of the criteria C, he was not likely to reoffend. But as to this issue, I am going to -- if the Court made the finding that criteria A is present, I'm going to submit the balance of the issues to the Court on the -- on the submitted documents.

So the crux of our issue is whether or not he meets criteria A, and I believe that is a predicate before we can go on to the second and third criteria. He has to have had those two convictions for sexually violent conduct, and it is my position that the People do not have the evidence to prove that that's what happened. And I am -- I will raise the objection as Counsel presents these documents which she believes are admissible and I believe are inadmissible. And so I'm going to make a hearsay objection to the admission of documents to prove up these predicates.

If the Court should decide against that position, I believe that even considering the information in these documents, there is insufficient evidence to prove [p.12] substantial sexual conduct on the part of -- as to two or more of the five victims for which I cannot contest the predatory allegation.

The Court: All right. Before we go on, let me just say to the district attorney's office, you can see the problems that arise in these cases when we take these *People vs. West* pleas --

Ms. Flaherty: Uh-huh.

The Court: -- In these sexual molestation cases.

Ms. Flaherty: Yes.

The Court: I strongly make a recommendation to the district attorney's office, if you wish to proceed -- if you're going to proceed in these areas, you want to take your -- you don't want these *People vs. West* pleas -

Ms. Flaherty: Uh-huh.

The Court: -- Because they do not help the Court at a later time such as this in determining what occurred. And I noticed that before; the district attorney gets into some difficulty because you've taken a *People vs. West* plea and because the plea was not clear.

Ms. Flaherty: Uh-huh.

The Court: It may not have been as clear as it should have been.

Ms. Flaherty: Uh-huh.

The Court: So I wish you'd please pass that on to your - -

Ms. Flaherty: I will.

The Court: -- To your cohorts in the district [p.13] attorney's office because it creates a lot of problems.

Ms. Flaherty: I can see that it does.

The Court: Okay. All right. Then -- so you're going to proceed by way of documents rather than --

Ms. Flaherty: Yes.

The Court: -- calling actual witnesses?

Ms. Flaherty: Yes, yes.

The Court: Okay. You may proceed.

Ms. Flaherty: Thank you, Your Honor.

Your Honor, the People first draw the Court's attention to *Welfare & Institutions Code* section 6600 where the terms "sexually violent predator" are defined and the code section actually discusses what the Court may consider in reaching its conclusion about whether this defendant, Mr. Carty, fits this definition.

The code section says that "conviction of one or more of the crimes enumerated in this section -- and I believe there's an agreement that *Penal Code* section 288(a) does follow into the category of enumerated crimes -- "may support a court's determination that a person is a sexually violent predator but shall not be the sole basis for the determination."

So, in addition to the actual fact of the convictions, the two felony 288 counts that apply to Mr. Carty's own children

and then the five 288(a) counts that apply to children other than Mr. Carty's own children, the Court may use the existence of any prior convictions shown with documentary evidence.

[p.14]

"The details underlying the commission of the offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence including but not limited to preliminary hearing transcripts, trial transcripts, probation and sentencing reports and evaluations by the state department of mental health."

What the -- what the People have for the Court today is several of the documents which are specifically stated in this code section. There is no preliminary hearing transcript because a preliminary hearing in this case was waived. There is no trial transcript because the defendant pled guilty before any trial actually occurred.

The People have, and the Court has before it in the actual court file, a copy of the report completed by the probation department after the plea was taken in this case. A probation officer did write a report and submit it to the Court. The actual hearing date was May 29th, 1991. The report was completed by a probation officer by the name of Julie Stollenwerk, S-T-O-L-L-E-N-W-E-R-K, and this probation report is in the court file -- I'll get back to that in a second -- as well as sentencing reports.

The sentencing reports, of course, would consist of a statement in aggravation, which is also in the court file, and a statement in mitigation, which is in the court file, and evaluations by the state department of mental health.

And as Mr. Cohan was just discussing a moment [p.15] ago, the evaluators who conducted examinations of Mr. Carty's mental health pursuant to the state requirement are Dr. Dennis Sheppard, S-H-E-P-P-A-R-D; Dr. Miccio-Fonseca, and I'll spell that: M-I-C-C-I-O hyphen F-O-N-S-E-C-A. She is also a Ph.D. psychologist. The third doctor is Terri Quinn, T-E-R-R-I, Q-U-I-N-N. She is a clinical psychologist, a Ph.D. as well; and of course, Dr. Alum- -- I'll just say it, Alumbaugh, A-L-U-M-B-A-U-G-H, which Mr. Cohan referenced in his remarks a moment ago.

So the People are submitting to the Court both the probation report and the sentencing statements in the court -- already in the court file, as well as these evaluations conducted by the state department of mental health evaluators which were submitted with the People's petition. That is specifically stated in the code section that the Court may consider.

Furthermore, should the Court consider it necessary, the People would proffer additional evidence coming from the police reports in this case. The actual probation report was done referencing this police report because, as I said earlier, there was no preliminary hearing transcript and there was no actual trial.

In compiling this probation report, the deputy probation officer references her source of information for this actual probation report. Her information came from the district attorney file, which I have before me, a San Diego police department report dated 2-20-91, as well as reports from children's hospital examinations. And in the probation [p.16] report, a careful reading of the probation report shows that this probation report was -- was made up of -- or of summaries of statements that were taken from more indepth

statements in the San Diego police department investigator's report dated 2-20-91.

And what the People are prepared to do, having read the probation report, having read the police report and having read the change of plea, is spell out for the Court why the five convictions defendant admitted in regards to other children, the five children other than his own two sons, constitute substantial sexual conduct under the code section.

It's the People's understanding that that is the primary matter in contention in question before the Court that Mr. Cohan is submitting to the Court on the other requirements under this code section, such as a mental disorder, predatory nature and likelihood of reoffense which are all addressed in great detail in the psychological reports that are submitted along with the actual petition.

So to begin with, if the Court pleases, the People would go over the counts which defendant admitted, the details regarding each of those counts which are contained both in the probation report and the police report which the probation officer relied on in making her report, and basically argue that the facts stated in the probation report from the police report constitute substantial sexual conduct.

The Court: Now, in this section 6600 that you've been [p.17] referring to --

Ms. Flaherty: Yes.

The Court: -- It lists the -- the documents or the kind of evidence that the Court may consider, right?

Ms. Flaherty: Yes.

The Court: You read those?

Ms. Flaherty: Yes.

The Court: It does not list police reports, does it?

Ms. Flaherty: Not explicitly, no, but there is a --

The Court: Is there a reason for that?

Ms. Flaherty: Well, Your Honor, I think in the code section when it says "including but not limited to," I think the code section is explicitly stating that these specific types of documents are not the only type of documents the Court may consider.

I think that this code section is leaving open, if you will, an avenue of documents which with sufficient indicia of reliability the Court may consider in reaching its conclusion. And that's why I talked about the probation report which is explicitly stated, and it's frankly the first of the documents which is listed in this code section that actually exists because there is no preliminary hearing transcript and there are no trial transcripts.

The first document then that actually exists that the Court may consider is a probation report. This probation report was done relying almost exclusively on information that came from the police report which was submitted in the actual district attorney's file to the [p.18] probation department for the evaluation of the report, and then there were some additional conversations with the parents of the victims in this probation report which the probation officer did include.

Now, if the Court is uncomfortable with the reference to police reports, I'm prepared to make my argument based on the facts which are specifically stated in the probation report which I think the code section says absolutely the Court may consider.

The Court: Does that mean -- does that mean anything in the probation report no matter how -- or multiple hearsay you're talking about? Anything in the probation report may be considered?

Ms. Flaherty: I think the intent of the writers of this code section was that the Court not being limited in its quest to determine what actually happened between the defendant and the victim as far as evaluating what constitutes a sexually violent predator. This is very broad language in this code section, very broad, and while it may offend the Court because of its suggestion that any hearsay -- basically any -- any hearsay statement that was stated in either the trial transcript or prelim transcript or any sentencing report could be considered and, of course, the sentencing reports which constitute the statement in aggravation.

The statement in aggravation is purely a sentencing document generated by the district attorney's office based on its own knowledge of the facts of the case [p.19] from the police report and conversations with the victims. The Court may consider it. I don't think the Court is required to accept everything it hears as absolute gospel, but I think the Court is allowed to consider it and use its own wisdom, if you will, in determining what actually happened and whether that constitutes officially substantial sexual conduct.

The Court: Okay. Now, the police reports, going to those first --

Ms. Flaherty: Yes.

The Court: -- They're business records, aren't they?

Ms. Flaherty: Yes.

The Court: I want to cite you to our *Evidence Code*, section 1271 of our *Evidence Code*, and the comments in the *Evidence Code* that come thereafter. At 1271 it's called "evidence of a writing as a record" and reads as follows: "evidence of a writing made as a record of an act, condition or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if (a) the writing was made in the regular course of a business; (b) the writing was made at or near the time of the act, condition, or event; (c) the custodian or other qualified witness testifies to its identify and the mode of its preparation; and (d) the sources of information and method and the time of preparation were such as to indicate its trustworthiness," Unqoute.

Now, you want to -- the Court to receive police reports under, I take it, this -- this exception to the [p.20] hearsay rule?

Ms. Flaherty: Yes, Your Honor.

The Court: Now, I read from the comment in the *Evidence Code* -- it says, "section 1271 -- and I'm quoting from part of that comment -- "requires the judge to find that the sources of information and the method and time of preparation of the record were such as to indicate its trustworthiness." And then it goes on to say, "under the language of the *Code of Civil Procedures* section 135" -- I think it's 31 -- "the judge must determine that the source of information and method and time of preparation were such as

to justify its admission." And it goes on to explain this area of trustworthiness.

And it goes on to say, and I quote -- I'm reading from the *Evidence Code* now, section 1270 -- under section 1271 -- "applying this standard, the cases have rejected a variety of business records on the ground that they were not based on the personal knowledge of the recorder or of someone with a business duty to report to the recorder. Police accident and arrest reports are usually held inadmissible because they are based on the narration of persons who have no business duty to report to the police." And it lists a number of citations and cases that support this -- this finding that police accident and arrest reports are usually held inadmissible and why.

So I just want to cite that to you as to why the Court is concerned about police reports because I have the *Evidence Code* before me that tells the Court that we [p.21] should be -- that such reports are usually held to be inadmissible. I'll give that to you if you want to see that.

Ms. Flaherty: No. I understand exactly what the Court is saying, and typically in criminal cases the police report has been held inadmissible based on that exact rationale.

But in this case where the code section describing the documents that the Court may use in reaching its conclusion, when the Court says -- when the code section says the Court can consider a probation report and the probation report was done entirely on the basis of a single police report, it seems somewhat artificial, if you will, to say the Court may consider the probation report yet it may not consider the police report when these two documents were basically done -- the probation report is a summary of the police report because of

the actual procedure about the way this guilty conviction unfolded, and --

The Court: Well --

Ms. Flaherty: -- I understand even though the distinction is artificial. If the Court wishes to stay merely with the probation report, which it is absolutely allowed to do specifically on the face of the code section, the People are prepared to make that argument based upon the probation report.

The Court: Let me point out to you the difference.

Ms. Flaherty: Uh-huh.

The Court: You're saying it doesn't -- it's not [p.22] logical to suppress or ban the police reports as such and still consider the probation reports. See, there is a difference. When the probation report is submitted at a sentencing hearing, the attorney for the defense or the attorney for the prosecution has a right to question that report.

In fact, it happened in this court yesterday. I had a sentencing before me -- a probation report before me. Defense Counsel said, Your Honor, that probation report is wrong in certain respects, it's not accurate, and I want to point out how it is not accurate and I can show to you how it is not accurate. And I had a hearing as to the accuracy of the probation report based on the motion of Defense Counsel, and I ruled that certain matters in the probation report were not admissible, and I ruled that they be changed based on that motion of Defense Counsel.

So a probation report is subject to be contested in that way at a sentencing hearing. The police reports, they're not subject to that same thing when they're made and filed; they become permanent police reports and they're not subject to being changed. But the probation officer's report is different in that respect. That's why I'll hear Mr. Cohan's argument on it. I'm inclined to rule that I will not consider police reports per se, but I am inclined to consider the probation reports for the reasons that I have stated because they're subject to content being contested.

Now, the evaluation of the mental health -- [p.23] mental health records, why, you say you have those in these -- in these opinions by these doctors. Is that what you're saying?

Ms. Flaherty: The mental health records?

The Court: Yeah.

Ms. Flaherty: You mean the actual evaluations which were conducted by the official evaluators assigned to evaluate Mr. Carty? Yes.

The Court: Yes.

Ms. Flaherty: These -- yes, I have all of these. I have all four of the actual evaluations from the psychologists, and I believe --

The Court: Do they need to be certified? Are all these documents that you're submitting, do they need to be certified?

Ms. Flaherty: Well, they have been sent along with the Court with the petition attached which was based on a declaration -

The Court: Well, perhaps we --

Ms. Flaherty: I don' t think there's --

The Court: Mr. Cohan, you don't object to -- on that basis that they may not be certified, do you?

Mr. Cohan: What may not be certified?

The Court: Object to the evaluations by the mental health evaluators.

Mr. Cohan: No. The evaluations were attached to the petition, and I am not asserting my hearsay objection to the Court's reviewing those documents.

[p.24]

The Court: Okay. Fine.

Mr. Cohan: Okay.

The Court: Fine?

Mr. Cohan: Yeah.

The Court: So they don't need certification as such.

Mr. Cohan: Yeah. They were -- I know that they were -- they were attached to the petition, which was filed with the Court, and I got an exact copy of it. I have independent

sources of copies of those reports. I mean, I think they are the accurate reports of these evaluators.

The Court: Okay. So I'll hear you on this, if you wish, Mr. Cohan. You've heard my statement with regard to police reports, probation reports, if you wish to say anything further.

Mr. Cohan: Let me illustrate one principle here by -- with an example from the list.

The department of mental health evaluations follow a protocol that the department has put out for their psychologists to use, and they've given these psychologists training in performing these evaluations, and they tell them to go through each of the criteria and analyze it and write up your opinion on whether or not you think he meets the criteria.

So now with criteria A, if you look at those reports, you'll see that they reference the probation report as the basis for what happened in these crimes, and they were given a packet of materials that the department of corrections has. They may have gotten additional materials [p.25] from the district attorney's office that may or may not have involved police reports and they write it up, in most cases taking it verbatim out of the probation report, what the circumstances were of the offense, and then they reach their conclusions at the end, and they say, well, we think that this meets the criteria.

Now, I think it's really clear that that would not be admissible evidence on the issue of whether or not he has the valid predicates because this is a legal question, and they are not in the position to determine what constitutes substantial

sexual conduct, but they are asked by the department of mental health to render that opinion, so they did do. That's part of the protocol, but I've been successful in excluding that from these trials.

We sometimes get into it in a probable cause hearing to see if they understand what the statute is about, but they themselves couldn't offer testimony about that subject because their expertise doesn't cover that point.

The Court: Well, I'm inclined to agree with you on that.

Mr. Cohan: Okay. Now, you'll notice that one of the documents that's listed in the 6600 list of documents that can be used to prove up the predicates is the report of the psychological evaluations.

Now, I think it would have been clear to the legislature that there is no way these people's statements about regurgitating what was in the probation report could be a basis for proving up those facts, but there is another [p.26] source of information that those experts could have that would add information to the Court and that -- and would be admissible, and that is that as part of their evaluation, as part of the protocol, they are to interview the client if he will consent to an interview. They do a forensic interview. And if he were to make admissions in that interview, those admissions would be admissible over any hearsay objection because they are a party admission in the civil case.

So it's possible that there could be relevant evidence on this point in the evaluations. If they said, yeah, I did this activity, that would be directly relevant, and for that reason, of course, it would be admissible on the point to prove up the

predicates, but the mere fact that they say that documentary evidence can be considered to prove it up does not create the -- a hearsay objection and I would --

The Court: Well, to get by -- I'm inclined to agree with you that their statement -- if the doctors made a statement that this -- this amounts to substantial sexual conduct, that's a conclusion for the Court to make --

Mr. Cohan: Yes.

The Court: -- Not for them to make.

Mr. Cohan: Yes. All right.

The Court: And I will base my decision based on the facts of the activity. And I agree with you in that regard.

Mr. Cohan: Well, this -- I'm arguing this in order to counter Counsel's argument that the fact that it's listed in this list of documents means that everything in it is [p.27] admissible. It's not, it's not -- everything in that report of the evaluators is not admissible to prove up those predicates --

The Court: You' re right --

Mr. Cohan: -- But some of it could be.

The Court: -- But their opinion that it amounts to substantial sexual conduct, I'm inclined to agree with you, Mr. Cohan.

Mr. Cohan: Okay. Their opinion, no, but if they had actual evidence of the defendant's admissions, that would be different.

The Court: Yes.

Mr. Cohan: Okay. Now, I wanted to mention by comparison the *California Constitution* Article 1, section 30(b) that provides for the admission of hearsay evidence in preliminary examinations. Now, that coats it. That amendment to the *Constitution* created a new exception to the hearsay rule.

The Court: Just a moment. I have a note from our Jury. I have a jury deliberating in a first-degree murder case and I need to do something.

Would you ask -- see if you can get the attorneys and the defendants, Rita.

The Bailiff: Your Honor, the court reporter is asking for a break.

The Court: Yeah. We need to take our recess now. It's lunchtime. We'll continue this discussion. I have -- I'm bringing the jury in at 1:30 to answer their question, [p.28] so we'll resume -- hopefully we'll be able to resume at 2:00 p.m., okay?

Mr. Cohan: Fine.

The Court: We'll resume at 2:00 p.m.

Ms. Flaherty: We'll be back at 2:00.

The Court: Yes. Thank you.

(Noon recess.)

[p.29]

The Court: Good afternoon, everyone.

Ms. Flaherty: Good afternoon.

Mr. Cohan: Good afternoon.

The Court: We're in session again in the matter of the People versus Jimmy Carty.

Good afternoon, Mr. Carty.

The Respondent: Good afternoon.

The Court: Mr. Carty is here with his attorney, Stephen Cohan. Ms. Katherine Flaherty is here representing the People.

We'll proceed with our discussion.

Go ahead, Mr. Cohan. You were making a point with regard to preliminary hearings.

Mr. Cohan: Yes. I was just -- to briefly close out -- that portion of the argument had to do with the constitutional amendment a few years ago, and I would offer both as a basis for the initiative change and for a legislative change allowing the use of hearsay in a criminal case, and that was the Article 1, section 30(b) of the *Constitution*.

It says specifically that hearsay is admissible and that's the way an exception to the hearsay rule is handled, by a constitutional amendment or by the legislature. It's explicit. These are very significant rights that are protected by these

evidence rules of centuries' standing, and if the legislature intended there [p.30] to be a blanket exception to the hearsay rule, they would have made it explicit. So that presents the statutory and constitutional grounds for my objection statewise.

And I just wanted to briefly also make the motion under federal rules that under the 6th and 14th amendments to the Federal *Constitution*, particularly the principles enunciated in *Chambers vs. Mississippi*, the right to confrontation, to cross-examine witnesses against you, to have effective assistance of counsel, to have a fair trial requires that these rules are -- these substantive rules of criminal procedure be applied to the protection of individuals when liberty is at stake, and so I'd also ask the Court to rule on my objection on federal constitutional grounds to exclude this kind of evidence based on -- on federal constitutional rights.

The Court: Well, what does it mean then? I mean, how am I to view this -- this statement here in this statute passed by our legislature? Our legislature is the voice of the People, and what -- what does it mean then when they say that I may -- I may use these probation reports, for example? What am I to take that to mean? Am I to ignore it? How am I to consider that statement?

Mr. Cohan: Every statement -- there are lots of sources of information from documents, and if it's based on hearsay, there has to be an exception before it's admissible. These convictions can be proved up, first of all, by the evidence of the conviction. This is -- these are documents that are well established. We proved [p.31] convictions. They are admissible. Even though they're documents, they are absolutely admissible to prove that he has been convicted of these offenses.

There are exceptions with respect to any statements that he may have made. Those can be used against him. There are plenty of documents that can be admitted against him, but they are admitted pursuant to an exception to the hearsay rule. I'm saying that unless there is a specific exception covering that evidence it is not admissible.

And as the Court's pointed out, we have critical evidence in this case that is dependent upon several levels of hearsay. Allegedly a child told a police officer who wrote it down in a report that was read by a probation officer that was then summarized and is now being offered as substantive evidence. If it is not admissible under an exception to the hearsay rule, it's not admissible evidence.

The Court: Thank you.

Do you wish to respond, Ms. Flaherty?

Ms. Flaherty: I don't think Defense Counsel answered the Court's last question. The Court asked Defense Counsel, what does this mean, this explicit language of the legislature, which says the Court can consider including but not limited to preliminary hearing transcripts, et cetera, documentary evidence, probation reports. The legislature says probation reports on its face?

If the Court were to say, I'm going to [p.32] disregard this explicit language of the statute and not allow any level of hearsay, any hearsay at all, unless there was an already recognized exception to the hearsay rule, what the Court would be saying essentially is that the People have to relitigate the actual offenses that constituted the acts for which defendant was originally convicted, and that's -- that's why all of this legislature has come about so the People do not have

to bring in all five of the unrelated victims, put them on the stand and testify here.

I mean, you have an individual who chose to waive prelim, who pled guilty before a trial, and while his taking responsibility for his acts is admirable, if he had never -- if he had chosen never to speak to a probation officer or a psychologist -- and that would be his right, it would be his absolute right to not talk to a police officer, a probation officer or any psychologist -- there would be zero evidence before the Court, zero.

If you would follow Counsel's reasoning for which to find that he fits under this statute, the People would have to go back to those kids who are now in their teens and early 20's and trying to move on with their lives, we would absolutely be required to put them on the stand and go back over that testimony and make them relive those events that happened in 1989 and 1990. I think that's what this is all about.

Now, I was asking about the police report earlier because it -- again, it seems to me to be creating [p.33] an artificial line to say that the probation report is admissible, as it says in the statute, where the probation report is frankly a regurgitation of the police report and a small additional amount of information. It's a repeat of the police report and a summary of the police report.

In addition, all four psychologists --

The Court: I explained to you why there's a difference between them.

Ms. Flaherty: And you did and I did hear that. You said because the probation report was subject to challenge, that it could be attacked; the truthfulness of its underlying state could be attacked at sentencing.

I mean, it's true that the statements of the -- of the victims in this case could be attacked if they had ever -- if they had ever gone to testimony. If there had been a preliminary hearing or a trial, they would have had that opportunity to attack, but that was waived, and certainly the probation report is subject to attack, absolutely.

I'm not aware that it was attacked in this case beyond the statement in mitigation, but I also point out that all four psychologists relied on the police reports for specific details of the underlying facts in evaluating what precisely happened in 1989 and 1990 that they could talk to the defendant about in formulating their opinions and conclusion about how he fits under the statute.

So I understand what the Court is saying. I submit on the issue of the police report. I do understand [p.34] the Court's concern; it's very well taken, but I would ask that the documentary evidence which is specifically allowed in this code section 6600(a), the probation reports and the psychologists' reports be admissible to this Court for its decision on whether Mr. Carty fits the criteria as a sexually violent predator.

The Court: All right. For the reasons that I've stated, the probation reports and the evaluation reports by the mental health examiners will be -- will be received; that is, as far as that objection goes. I mean, you have every right, Mr. Cohan, to examine those doctors, of course, who made those

evaluations, if you wish to do so. So that objection is overruled.

Now, where are we now? I have not reviewed any of these documents yet because I have not felt -- I've felt I have not had authority to do so. I have not seen the probation report –

Mr. Cohan: Okay.

The Court: -- or these other documents.

Mr. Cohan: Well, now I think the case is in the posture that we have five counts on victims for which there was a conviction of 288(a), people who were not relatives or closely connected to the respondent, and the People are alleging that the underlying facts of those convictions constituted substantial sexual conduct. It's our position that they were straight 288(a)'s that Mr. Carty pled to. He pled *People vs. West*. It was not a significant issue with respect to those five counts, what the specifics of the [p.35] conduct was. A simple touching or fondling would have been sufficient; substantial conduct would have been sufficient.

It's interesting that on the two counts where there was a special allegation of substantial sexual conduct he admitted it, but with these counts where that allegation was not attached, it was not an issue. He pled *People vs. West* for the benefit of the plea bargain and that was it. Now Counsel wants to suggest to you that they had substantial sexual conduct, and she can offer what evidence she thinks she has based on the Court's ruling, say on the probation report, to substantiate that. I don't think it's there, but we'll see how the Court views it.

The Court: Do you waive -- I just want to make sure you're waiving your right to have those witnesses come into court, the witnesses with regard to the probation report and the doctors who made the medical evaluations.

Mr. Cohan: Not with the probation report. I'm -- the criteria under B and C, what I call B and C under the protocol, having to do with the mental disorder and the likelihood of reoffense -- and I'm not demanding the opportunity to cross-examine those witnesses. Their testimony, in effect, is in their reports, in their evaluations. I'm contesting only the criteria A and I am contesting what's in the probation report that that -- and alleging, now that the Court has ruled that that is admissible, that what is in the probation report does not constitute substantial sexual conduct under the statute.

The Court: Okay. Your client -- I just want to make [p.36] sure he understands he has a right to be confronted by the witnesses against him and he's giving up that right.

Mr. Cohan: Well, what he is saying is is that the plaintiff is unable to prove up criteria A, that he meets the criteria as a sexually violent predator for having committed these acts against two or more victims. If that's true, then we don't have to get to the questions of B and C. The petition is -- fails because there hasn't been the requisite convictions, and that's what we're contesting.

If the Court should find against us on that issue, we are going to submit the factual issue on the remaining criteria. But right now we're contesting that the fundamental convictions are not there, and Counsel is going to have to prove it up on the basis of the documents that the Court has

permitted which, as I understand it so far, is the probation report.

The Court: You're waiving -- you're not requiring any of those witnesses be called on that issue?

Mr. Cohan: I'm not requiring that -- no. I'm saying that they cannot prove substantial sexual conduct for those convictions. With respect to the other criteria, I'm submitting it. Okay. I'm not demanding that these witnesses come in to prove that he has a mental disorder or that he's likely to reoffend.

The Court: And Mr. Carty joins you in that?

Is that right, Mr. Carty?

The Respondent: Yes.

The Court: Your answer, sir?

[p.37]

The Respondent: Yes.

The Court: Okay. Thank you.

Okay. You may proceed.

Ms. Flaherty: Your Honor, the People could see two ways of doing this, and I would ask the Court for guidance on which the Court feels is most appropriate.

It's the People's perception and understanding that Mr. Cohan is basically submitting on the issue of whether Mr.

Carty has a diagnosed mental disorder -- we' ll go to that factor first -- and all four psychologists who evaluated Mr. Carty pursuant to direction by the state department have diagnosed various mental disorders, primarily pedophilia, depression, manic/depression and some spinoffs of that. The People -- it's the People's position that that -- that Defense Counsel basically yields that there is a mental disorder that is diagnosed in all four evaluations.

The Court: He's submitting that based on those documents?

Mr. Cohan: Yes. I am not offering -- I mean, I can offer evidence, I can contest it in argument, but it is not my intention to do that. If the Court wants me to, I'll be happy to argue against the validity of their conclusions. But we're not asking for an evidentiary contest on that issue because we believe that this petition fails on the first criteria.

The Court: All right.

You may proceed.

[p.38]

Ms. Flaherty: Then to clean it up, the third criteria regarding the fact that it's the People's position that defendant represents a danger to the health and safety of others, that is a -- the third factor, which is also a conclusion of three of the four psychologists in -- in the evaluations, so the People would be submitting these four evaluations to the Court for review for determination of those two factors.

Now, on to the principal question before us: Is there substantial sexual conduct involving the five individuals who

are not related to Mr. Carty required to find him a sexually violent offender under the code section? I can see two ways of doing it. I could provide the Court -- or the Court has before it in the court file a copy of the probation report and the four evaluations. The Court could just take time and read these reports, five documents.

The Court: Well, they should be marked -- they should be provided --

Ms. Flaherty: Yes.

The Court: -- And marked for evidence --

Ms. Flaherty: Yes.

The Court: -- Marked as exhibits, and then you may point out to the Court where in those -- I'll have them before me, and you may point out to the Court where in those documents you rely -- what you're relying upon for your proof.

Ms. Flaherty: Thank you. I think that would be the [p.39] easiest way to do it after the Court has already read them rather than me just reading them all aloud into the record.

The Court: All right.

Mr. Cohan: I'm sorry. Now, which documents specifically does Counsel want to admit on this issue?

Ms. Flaherty: The probation report --

Mr. Cohan: Yes.

Ms. Flaherty: -- and all four psychological evaluation reports.

Mr. Cohan: Well, the -- I've stipulated to the admission of the psychological evaluations, but I don't think that they have any pertinence to this issue.

The Court: Well, if they don't, they don't. You can certainly argue that. She wants me to look at them, and you certainly can argue that they don't have any pertinence.

Mr. Cohan: If those witnesses were here, I would object to their testifying on this point, and I think the Court would uphold that objection because they have -- it' s not a question of expertise whether or not he meets the predicate criteria: it's a legal issue.

Ms. Flaherty: Well, if I could just -- I think I can cut this off at the pass.

The Court: I think I agree with you on that.

Ms. Flaherty: Yes. The People -- the experts make their conclusions. I agree with Defense Counsel that the Court is not to accept as gospel the experts' conclusions on whether the stated details of the offense constitute substantial sexual conduct. That is purely a finding for [p.40] this Court.

The Court: I'm not accepting that. I'm not even considering it, Mr. Cohan.

Mr. Cohan: All right.

Ms. Flaherty: Okay.

The Court: I'm going to make the decision based on the law as to whether there's substantial sexual conduct.

Ms. Flaherty: Right. That's all the People are asking, is for the Court to review the facts itself.

The Court: Okay. Fine.

Ms. Flaherty: And that --

The Court: May I have those documents, please?

Ms. Flaherty. Okay. They're in the court file. If I could ask madam clerk to mark them in order.

I can pull them out for you to make it easier.

I don't have Ms. Alumbaugh's report in here.

Mr. Cohan: Your Honor, should I make a copy of it?

(Court's Exhibits Nos. 1, 2 and 3 identified.)

Ms. Flaherty: Your Honor, the People have marked with madam clerk's assistance and shown to Mr. Cohan as Court's Exhibit No. 1, the probation officer's report in the matter of Jimmy Carty, the original court number, CR122000, and it was received by the Court on June 11th, 1991.

Court's Exhibit No. 2 is three psychological reports stapled together that were all conducted for the purposes of this hearing this year for Mr. Carty. They are [p.41] psychological reports from Dr. Sheppard, Dr. Terri Quinn and Dr. Miccio-Fonseca.

The fourth psychological evaluation is marked as Court's Exhibit No. 3 and it is an evaluation by Dr. Mary Jane Alumbaugh prepared specifically for the purpose of the Court's review for this hearing.

May I present these to the Court?

The Court: Yeah.

So I understand, aside from what you -- the objection you've made, you have no objection, Mr. Cohan, to the Court reviewing these documents.

Mr. Cohan: No.

The Court: All right. The Court will review these documents. Let's -- let's say we resume here at 3:30.

Ms. Flaherty: All right.

Mr. Cohan: All right.

Ms. Flaherty: Thank you.

The Court: That will give me a chance to review these documents. Thank You.

Did you want the entry of a guilty plea in this case? Do you that need that also?

Ms. Flaherty: I don't think it's necessary.

The Court: Okay. Thank you. Till 3:30.

(Recess.)

The Court: We're in session again in the matter of People versus Jimmy Carty. Mr. Carty is present. Both [p.42] Counsel are present.

The Court has read now -- read and reviewed the exhibits in the case which include the evaluations by the three -- three doctors -- or four doctors -- and also the probation report.

Now, as I understand it, the issue that we're discussing now is whether masturbation occurred with regard to children who were not the sons of the defendant.

Is that right? Is that the issue?

Ms. Flaherty: That's correct. Nobody is alleging that any intercourse took place under 6600.1(a). That's correct. So we're just talking about masturbation.

The Court: So in reaching that decision, the Court must consider the definition of the term "masturbation."

Now, we have looked at various dictionaries that we have here in the courthouse. The *Webster's New World Dictionary*, Third College Edition, defines "to masturbate" as "to manipulate." The *Funk and Wagnalls Standard Dictionary* dated 1993 defines "masturbation" as "a stimulation of the sexual organs, usually by oneself." So that's a stimulation. The *American Heritage Dictionary*, 1983, defines "masturbation as "the excitation" -- e-x-c-i-t-a-t-i-o-n -- "of the genital organs usually to orgasm, a means other than sexual intercourse."

Those are the definitions that I have so far. There may be others in various other dictionaries, but to the Court, the

Court's best – if the Court must define [p.43] masturbation, we must find that it requires something more than a mere touching. It is not masturbation if the defendant merely touched, with nothing more either outside or inside the clothing, the sexual organs or private organs of a child or a young boy. There has to be something more, and so you may proceed on that basis.

Ms. Flaherty: Yes, Your Honor.

Going over the victims -- and I will refer to them in the same manner as they are referred to in the probation report, and Mr. Cohan and I have agreed that we have been able to match up the number -- the victim number with the names as they are referred to in the probation report.

Victim No. 3, Brandon S., was eight years old at the time of the incident. He stayed overnight one time, October 6th, 1990, visiting his friends, who were the defendant's two young sons. The victim told his mother and authorities that the defendant grabbed his genital area for several hours as he played Nintendo. Brandon reported that he told the defendant to stop, but the defendant persisted touching Brandon repeatedly on his penis, over his clothing through his pants over a period of several hours. And that is the information the Court has before it in the probation report.

Mr. Cohan: Okay. And what page is that? What page and paragraph, please?

Ms. Flaherty: That would be the probation report or Court's Exhibit No. 1 that the Court has before it, and [p.44] Victim No. 3 is addressed on page 5.

The Court: So is it your contention that grabbing the sexual organ over the clothing, is that it?

Ms. Flaherty: Yes, grabbing the sexual organ over the clothing repeatedly over a period of several hours when the eight-year-old victim has told the defendant to stop, that that constitutes a manipulation or an attempt to stimulate or excite as the dictionary definitions of masturbation would require; that a repeated touching, especially after an eight-year-old has said stop, is more than mere touching.

The Court: Okay. Go on.

Ms. Flaherty: Victim No. 4 was six years old at the time of the incident, and victim No. 4 is also referenced on page 5 of the probation report. His name is Chad H. He was also friends with the victim -- with the defendant's young sons, and he visited the defendant's home often between the end of August in 1990 and October 11th, 1990, when the defendant's sons were removed from the home.

When interviewed, the six-year-old reported that the defendant had touched his quote "private," referring to his genital organ, both over and under his clothing, quote "lots of times" usually while the boy was playing Nintendo with the defendant's sons. And it's the People's position that touching -- he actually said "front private" in quotation marks -- over and particularly under the clothing a number of times, this repeated touching of the victim's penis is more than a mere touching, that that would also be a manipulation and a stimulation or attempt to [p.45] stimulate and more than a mere touching.

The Court : Okay. Go ahead.

Ms. Flaherty: Victim No. 5 is the youngest victim who is not the defendant's son. He is Chase A., a five-year-old boy. He reported a single instance sometime in the summer of 1990 in which the defendant quote "pinched" his penis directly under his shorts and quote "bit" his private. In an interview with the -- well, I'm sorry. I'll back up for a moment.

That is described, Victim No. 5's experience, in the probation report, Court's Exhibit No. 1, on page 7 of the probation report. And, in addition, the probation report notes that the defendant admitted to the sheriff's department in the course of this investigation that he had pinched Victim No. 5's penis, and that is referred to on page no. 13 of the probation report.

In addition to Victim No. 5, the five-year-old child, Dr. Dennis Sheppard's report, which is the first report on Court's Exhibit No. 2 the Court has before it, on page no. 8, Dr. Sheppard, in reviewing Navy medical records, noted that the defendant admitted molest of Chase that included quote "playing with the boy's penis under his shorts and sucking his penis" or oral copulation. And it would be the People's position, of course, that that is more than mere touching and constitutes masturbation.

Mr. Cohan. What page is that on?

Ms. Flaherty: Page 8 of Dr. Sheppard's report. The second paragraph is a one-sentence paragraph.

[p.46]

Victim Six is Sean S. Sean S. was seven years old, and Sean S. reported a single incident of the defendant

fondling his penis, and that was described on page 7 of the probation report. The boy, Sean, age seven, stated that the defendant touched his "private part" -- that's in quotation marks -- as the victim was watching TV, and he stated that the defendant used his hand on the outside of his clothing, and lasted approximately one minute.

The Court: Where is the -- I'm looking at that. Where is the word "fondling" used? Is there any reference to fondling with regard to Victim No. 6?

Ms. Flaherty: The Court is correct. I don't see "fondling." The word is just "touched."

The Court: Okay.

Ms. Flaherty: And as far as the People's arguments go, the facts coming from the probation report on this incident, Victim No. 6, are the weakest as far as details which would support a claim of more than mere touching. It actually looks on its face like mere touching.

The Court : Okay.

Ms. Flaherty: Then Victim No. 7 is described on page 8 of the probation report. Victim No. 7 was 14 years old at the time, and he described three incidents of molest over the summer of 1990, and he said that it would happen while he was at the defendant' s home. It consisted of the defendant touching the victim's private part from both outside and inside his clothing.

And this victim which I'm inferring here being [p.47] 14 years old was better able to explain that he would be playing Nintendo, the defendant would come over, sit next to him on

the sofa. The defendant would start touching and caressing the outside of his leg, then the inner portion of his leg. The defendant would continually move his hand up to the victim's crotch, touching his penis and testicles. Then the defendant would reach down inside the victim's pants and underwear and touch his penis with his hands. The victim described the touching as quote "rubbing" his private.

And the victim also described a situation where one of these three acts of molest occurred in which the victim, the defendant and his two children were shown a pornographic movie at the defendant's home.

The Court: Now, is it your burden to show that this substantial sexual conduct occurred on at least two occasions?

Ms. Flaherty: No. Two or more victims, that's what's required under the code section that -- that the People show that there was substantial sexual conduct in the form of masturbation with two or more victims.

The Court: Two or more.

Ms. Flaherty: That's the actual language of the code section.

I think what the code has -- I mean -- I'm sorry. I think what the Court has before it are two strong incidents involving Victim No. 7, the 14-year-old, who described what is -- what sounds most technically like the [p.48] common understanding of masturbation, underneath his clothes, the oldest victim;

And then the youngest victim, who was able to tell his mother that the defendant quote "bit" him on his private, the

five-year-old, Chase, Victim No. 5, the defendant later admitted orally copulating the youngster, I think those two victims are strong -- strongly suggestive of masturbation occurring between the two while the other victims, Victim No. 3 and Victim No. 6, are much weaker, and Victim No. 4, the six-year-old, while he described repeated incidents, it's my perception upon reading the documents that he may be too young at six years old to really describe what happened. He just said over and under his clothing lots of times, but I cannot offer the Court anything more specific than that.

The Court: Thank you very much, Ms. Flaherty.

Mr. Cohan.

Mr. Cohan: Well, if I've understood correctly, I think, first of all, I want to address what I think Counsel has characterized as the strongest counts. I think essentially she's admitted that Victim No. 6 is no more than mere touching. So if that's true, then we have four victims left. But victims 5 and 7 are the ones you believe are the strongest?

Ms. Flaherty: Uh- huh.

Mr. Cohan: Okay. With respect to Victim 7, taking that first, this is Michael -- is that -- no wait a second.

Ms. Flaherty: Uh- huh.

[p.49]

Mr. Cohan: Okay. Let's take Victim No. 5 first. That's Chase. Okay. First of all, I wanted to challenge this -- the use of the Sheppard report. This is multiple levels of hearsay, and if the Court is looking at that page 8 of Sheppard's

report, the second paragraph is what she's quoting there, and it says, "according to Navy medical records, Mr. Carty quote 'states molest of Chase included' -- then more quotation marks -- 'playing with the boy's penis under his shorts' -- quotation marks -- then 'and S-M-N, sucking his penis.'" There are final quotations.

I think what we're talking about here is a medical record that Sheppard is reporting, and that medical record is enclosed in quotation marks from beginning to end covering -- states from beginning of -- states to the penis, but that the quote -- the intended quote within that is only the first portion of that, "playing with the boy's penis under his shorts." I guess Counsel isn't claiming that there is oral copulation here but that there's an admission of playing with the boy's penis under his shorts, and that's to constitute the masturbation. This is a --

The Court: No, She's saying use of the word "sucking."

Mr. Cohan: Okay. So they're claiming --

The Court: There's the use of the word "sucking" in that report.

Mr. Cohan: Yes, but I would contest that that is attributed by quote to Mr. Carty. Now, remember, we're [p.50] talking about an alleged report by Mr. Carty to a naval investigator who wrote a report and then repeated by Sheppard who is, you know, repeating this hearsay again. So this is different -- a little bit different than what's in the probation report. That statement is not in the probation report. So I think the hearsay objection is specifically different with respect to that alleged statement.

The probation report statement -- now we're talking about 5. This is on page 7, right?

Ms. Flaherty: Uh-huh.

Mr. Cohan: Victim 5 said that the defendant also pinched his penis while they were playing. That's the only genital touching that Victim 5 describes in the probation report. So I guess Counsel is asking you to say that "pinched his penis while they were playing" constitutes masturbation.

The Court: No, I don't understand her argument that way.

Mr. Cohan: Okay. What --

The Court: Her argument is that the playing with and sucking the penis constituted masturbation.

Mr. Cohan: Well, I think we can see here that this illustrates the difficulty of when you're dealing with this kind of hearsay because the word "playing" appears in the probation report. It says, "Victim No. 5 said that the defendant also pinched his penis while they were playing," count 30, which is the pertinent count. Now -- we're [p.51] talking in addition now page 8 of the -- of Sheppard's Report, "according to Navy medical records, molest of Chase included playing with the boy's penis under his shorts."

You see, we don't have this specifically tied to count 30; we don't have him specifically saying that Carty says this. I mean, we're talking several levels of hearsay.

I think the Court can't use Sheppard's report to bolster the evidence of substantial sexual conduct. We have to rely on the probation report unless we -- well, the Court ruled that

part of the reliability of this probation report is -- it's open to challenge although, as I pointed out, there was no material reason to challenge it at the time, but this naval medical record doesn't have any -- even the possibility of that indicia of reliability.

The Court: But you have the right, Mr. Cohan, to cross-examine that doctor if you wish to do so.

Mr. Cohan: Well, the doctor would just be repeating the hearsay. He can't attest to the naval medical record being accurate. The doctor can offer an opinion on these issues that doctors offer opinions on, but he's just repeating some hearsay here. This doesn't give -- he doesn't have any expertise to establish the validity of that statement, so it's my contention that the only evidence the Court has in front of it on the hearsay ruling that the Court's made is that last -- that last sentence of the third full paragraph on page 7 of the probation report, "pinched his penis."

[p.52]

The other count that Counsel believes is strong is against Victim No. 7, and this is on page 8 of the probation report. And the -- the pertinent statement there is in the first paragraph at the top, "touching the victim's private part from outside and inside his clothing," count 29. That's the pertinent count. This is Michael. So we have touched outside and inside the clothing, touched his private part.

The Court: Which number is that? Which victim number?

Mr. Cohan: This is Victim No. 5 --

Ms. Flaherty: No.

Mr. Cohan: No. I'm sorry. Victim No. 7, who is -- Victim No. 7, I think, is Michael.

The Court: All right. Yeah, but he was the one who describes quote "rubbing" his private, rubbing; is that correct? He used the word quote "rubbing" unquote.

Mr. Cohan: Okay. The last sentence in that paragraph, "the victim described the touching as rubbing his private." Okay. Okay. Is the Court ruling that that -- that count constitutes masturbation?

The Court: Yes.

Mr. Cohen: All right. Then we'll note our exception to that.

The Court: Yes.

Mr. Cohan: Okay. All right. If that's one victim, then has the Court selected another victim that the Court believes meets the criteria of masturbation?

[p. 53]

The Court: Well, yes. That's No. 5.

Mr. Cohan: Okay.

The Court: You asked me -- I mean, I think the evidence is sufficient with regard to Nos. 5 and 7 --

Mr. Cohan: Okay.

The Court: -- Of masturbation.

Mr.Cohan: Well, I'd ask the Court to clarify for the record then whether or not the evidence is sufficient in the probation report to support that, or is the Court also relying on Sheppard's reference to the Navy medical record?

The Court: I'm also relying on Dr. Sheppard's reference to the medical record. Here's a doctor, he looks at various sources, he examines an official medical record from the Navy, and in that official medical record the defendant apparently admits quote "sucking" unquote the boy's penis. I think that action is sufficient for masturbation.

Now, some might also say that pinching or biting -- pinching is more than -- some might say that pinching is more than touching, but I don't have to rely on that. I'm relying on the -- on the sucking, which the doctor found, in an official report.

So I will say to you, Mr. Cohan, that I do not find that Nos. 3 -- I cannot find that the grabbing is sufficient to constitute masturbation. I'm not sure what that means. I'm not sure that indicates any movement of the hand upon the private part. No. 4, that's touching a lot of times. Again, I'm not convinced that that amounts to [p.54] masturbation. And No. 6 also, I'm not convinced that that touching amounts to masturbation. But with regard to Nos. 5 and 7, for the reasons that I have stated, I think the evidence is sufficient.

Mr. Cohan: Okay. I'm satisfied with the record.

The Court: Is there anything else?

Ms. Flaherty: I would just say in regards to Victim 5 as well, the young victim was able to describe not only skin-to-skin contact between the defendant's hand and his own penis,

but he also described -- the child himself was able to describe the defendant's mouth being in his genital area. The probation report references the upper inner thigh. I think the child used the word "bit." That's perhaps his five-year-old perception, but I think that also bolsters the Court's conclusion on that count.

The Court: The matter is submitted then?

Mr. Cohan: Yes.

The Court: Ms. Flaherty?

Ms. Flaherty: Submitted.

The Court: The Court will find, for the reasons that I've stated, that Mr. Carty should be committed to the state department of mental health for two years on the grounds that he has been convicted of a sexually violent offense against two or more victims, that he has received a determinate sentence, and that he does have a mental disorder that makes him a danger to the health and safety of others, and that it is likely he will engage in sexually violent criminal behavior.

[p.55]

And if the People will prepare an appropriate Order, I will sign that Order.

Ms. Flaherty: Yes.

The Court: Is there anything else we need to do?

Ms. Flaherty: No, Your Honor. I'll get that Order prepared. Thank you.

The Court: That's all. We're in recess.

(Recess.)

APPENDIX I

STATUTORY PROVISIONS INVOLVED

Cal. Welf. & Inst. Code §§ 6600-6609.3
(West 1998 & Supp. 1999)

WELFARE AND INSTITUTIONS CODE
DIVISION 6. ADMISSIONS AND JUDICIAL COMMITMENTS
PART 2. JUDICIAL COMMITMENTS
CHAPTER 2. COMMITMENT CLASSIFICATION
ARTICLE 4. SEXUALLY VIOLENT PREDATORS

§ 6600. Definitions

As used in this article, the following terms have the following meanings:

(a) "Sexually violent predator" means a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

For purposes of this subdivision, a prior finding of not guilty by reason of insanity for an offense described in subdivision (b), a conviction prior to July 1, 1977, for an offense described in subdivision (b), a conviction resulting in a finding that the person was a mentally disordered sex

offender, or a conviction in another state for an offense that includes all the elements of an offense described in subdivision (b), shall also be deemed to be a sexually violent offense even if the offender did not receive a determinate sentence for that prior offense.

Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health. Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(b) "Sexually violent offense" means the following acts when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as provided in subdivision (a): a felony violation of paragraph (2) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262, Section 264.1, subdivision (a) or (b) of Section 288, or subdivision (a) of Section 289 of the Penal

Code, or sodomy or oral copulation in violation of Section 286 or 288a of the Penal Code.

(c) "Diagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

(d) "Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody.

(e) "Predatory" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.

(f) "Recent overt act" means any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior.

§ 6600.05. Mental health facility; Atascadero State Hospital; alternate facilities; permanent facility

(a) Until a permanent housing and treatment facility is available, Atascadero State Hospital shall be used whenever a person is committed to a secure facility for mental health treatment pursuant to this article and is placed in a state hospital under the direction of the State Department of Mental Health unless there are unique circumstances that would preclude the placement of a person at that facility. If a state hospital is not used, the facility to be used shall be located on a site or sites determined by the Director of Corrections and

the Director of Mental Health. In no case shall a person committed to a secure facility for mental health treatment pursuant to this article be placed at Metropolitan State Hospital or Napa State Hospital.

(b) A permanent facility for the housing and treatment of persons committed pursuant to this article shall be located on a site or sites determined by the Director of Corrections and the Director of Mental Health, with approval by the Legislature through a trailer bill or other legislation. The State Department of Mental Health shall be responsible for operation of the facility, including the provision of treatment. In no event shall any persons other than those placed pursuant to this article be housed or treated at a facility established pursuant to this subdivision unless expressly authorized by the Legislature.

§ 6600.1. Victims under the age of 14; sexually violent offense; substantial sexual conduct

(a) If the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14 and the offending act or acts involved substantial sexual conduct, the offense shall constitute a "sexually violent offense" for purposes of Section 6600.

(b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

§ 6601. Persons in custody; determination as potential sexually violent predator; prerelease evaluations; petition for commitment; time limitations exclusion

(a) Whenever the Director of Corrections determines that an individual who is in custody under the jurisdiction of the Department of Corrections, and who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator, the director shall, at least six months prior to that individual's scheduled date for release from prison, refer the person for evaluation in accordance with this section. However, if the inmate was received by the department with less than nine months of his or her sentence to serve, or if the inmate's release date is modified by judicial or administrative action, the director may refer the person for evaluation in accordance with this section at a date that is less than six months prior to the inmate's scheduled release date.

(b) The person shall be screened by the Department of Corrections and the Board of Prison Terms based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history. This screening shall be conducted in accordance with a structured screening instrument developed and updated by the State Department of Mental Health in consultation with the Department of Corrections. If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections shall refer the person to the State Department of Mental Health for a full evaluation of whether the person meets the criteria in Section 6600.

(c) The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment

protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.

(d) Pursuant to subdivision (c), the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health. If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment under Section 6602 to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment.

(e) If one of the professionals performing the evaluation pursuant to subdivision (d) does not concur that the person meets the criteria specified in subdivision (d), but the other professional concludes that the person meets those criteria, the Director of Mental Health shall arrange for further examination of the person by two independent professionals selected in accordance with subdivision (g).

(f) If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition to request commitment under this article shall only be filed if both

independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d). The professionals selected to evaluate the person pursuant to subdivision (g) shall inform the person that the purpose of their examination is not treatment but to determine if the person meets certain criteria to be involuntarily committed pursuant to this article. It is not required that the person appreciate or understand that information.

(g) Any independent professional who is designated by the Director of Corrections or the Director of Mental Health for purposes of this section shall not be a state government employee, shall have at least five years of experience in the diagnosis and treatment of mental disorders, and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. The requirements set forth in this section also shall apply to any professionals appointed by the court to evaluate the person for purposes of any other proceedings under this article.

(h) If the State Department of Mental Health determines that the person is a sexually violent predator as defined in this article, the Director of Mental Health shall forward a request for a petition to be filed for commitment under this article to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment in the superior court.

(i) If the county's designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed

to the jurisdiction of the Department of Corrections. The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article.

(j) The time limits set forth in this section shall not apply during the first year that this article is operative.

(k) If the person is otherwise subject to parole, a finding or placement made pursuant to this article shall not toll, discharge, or otherwise affect the term of parole pursuant to Article 1 (commencing with Section 3000) of Chapter 8 of Title 1 of Part 3 of the Penal Code.

(l) Pursuant to subdivision (d), the attorney designated by the county pursuant to subdivision (i) shall notify the State Department of Mental Health of its decision regarding the filing of a petition for commitment within 15 days of making that decision.

§ 6601.3. Custodial evaluation; maximum time

The Board of Prison Terms may order that a person referred to the State Department of Mental Health pursuant to subdivision (b) of Section 6601 remain in custody for no more than 45 days for full evaluation pursuant to subdivisions (c) to (h), inclusive, of Section 6601, unless his or her scheduled date of release falls more than 45 days after referral.

§ 6601.5. Review of petition for likelihood of sexually violent predatory criminal behavior upon release

In cases where an inmate's parole or temporary parole hold pursuant to Section 6601.3 will expire before a probable cause hearing is conducted pursuant to Section 6602, the agency bringing the petition may request an urgency review pursuant to this section. Upon that request, a judge of the superior court shall review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. If the judge determines that the petition, on its face, supports a finding of probable cause, the judge shall order that the person be detained in a secure facility until a hearing can be held pursuant to Section 6602. The probable cause hearing provided for in Section 6602 shall be held within 10 calendar days of the date of the order issued by the judge pursuant to this section.

§ 6602. Probable cause hearing; right to counsel; custody requirements

(a) A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing. If the judge determines there is not probable cause, he or she shall dismiss the petition and any person subject to parole shall report to parole. If the judge determines that there is probable cause, the judge shall order that the person remain in custody in a secure facility until a trial is completed and

shall order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections or other secure facility.

(b) The court shall notify the State Department of Mental Health of the outcome of the probable cause hearing by forwarding to the department a copy of the minute order of the court within 15 days of the decision.

§ 6602.5. State hospital placement; probable cause determination; identification of persons who have not had a probable cause hearing

(a) No person may be placed in a state hospital pursuant to the provisions of this article until there has been a determination pursuant to Section 6601.3 or 6602 that there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior.

(b) The State Department of Mental Health shall identify each person for whom a petition pursuant to this article has been filed who is in a state hospital on or after January 1, 1998, and who has not had a probable cause hearing pursuant to Section 6602. The State Department of Mental Health shall notify the court in which the petition was filed that the person has not had a probable cause hearing. Copies of the notice shall be provided by the court to the attorneys of record in the case. Within 30 days of notice by the State Department of Mental Health, the court shall either order the person removed from the state hospital and returned to local custody or hold a probable cause hearing pursuant to Section 6602.

(c) In no event shall the number of persons referred pursuant to subdivision (b) to the superior court of any county exceed 10 in any 30-day period, except upon agreement of the presiding judge of the superior court, the district attorney, the public defender, the sheriff, and the Director of Mental Health.

(d) This section shall be implemented in Los Angeles County pursuant to a letter of agreement between the Department of Mental Health, the Los Angeles County district attorney, the Los Angeles County public defender, the Los Angeles County sheriff, and the Los Angeles County superior court. The number of persons referred to the superior court of Los Angeles County pursuant to subdivision (b) shall be governed by the letter of agreement.

§ 6603. Trial by jury; right to counsel; examination by expert or professional; access to records; unanimous verdict

(a) A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

(b) The attorney petitioning for commitment under this article shall have the right to demand that the trial be before a jury.

(c) If no demand is made by the person subject to this article or the petitioning attorney, the trial shall be before the court without jury.

(d) A unanimous verdict shall be required in any jury trial.

(e) The court shall notify the State Department of Mental Health of the outcome of the trial by forwarding to the department a copy of the minute order of the court within 72 hours of the decision.

§ 6604. Burden of proof; commitment for treatment; term; facilities

The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. If the court or jury determines that the person is a sexually violent predator, the person shall be committed for two years to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health, and the person shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a new petition for commitment under this article or unless the term of commitment changes pursuant to subdivision (e) of Section 6605. Time spent on conditional release shall not count toward the two-year term of commitment, unless the person is placed in a locked facility by the conditional release

program, in which case the time in a locked facility shall count toward the two-year term of commitment. The facility shall be located on the grounds of an institution under the jurisdiction of the Department of Corrections.

§ 6604.1. Commitment term

(a) The two-year term of commitment provided for in Section 6604 shall commence on the date upon which the court issues the initial order of commitment pursuant to that section. The two-year term shall not be reduced by any time spent in a secure facility prior to the order of commitment. For subsequent extended commitments, the term of commitment shall be from the date of the termination of the previous commitment.

(b) This section shall become inoperative on July 1, 2001, and, as of January 1, 2002, is repealed, unless a later enacted statute that is enacted before January 1, 2002, deletes or extends the dates on which it becomes inoperative and is repealed.

§ 6604.1. Commitment term

Text of section operative July 1, 2001

(a) The two-year term of commitment provided for in Section 6604 shall commence on the date upon which the court issues the initial order of commitment pursuant to that section. For subsequent extended commitments, the term of commitment shall be from the date of the termination of the previous commitment.

(b) This section shall become operative on July 1, 2001.

§ 6605. Post-commitment examinations; petition for conditional release; annual notice; hearing to show cause; burden of proof; term of commitment; request for review by Department of Mental Health

(a) A person found to be a sexually violent predator and committed to the custody of the State Department of Mental Health shall have a current examination of his or her mental condition made at least once every year. The person may retain, or if he or she is indigent and so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person.

(b) The director shall provide the committed person with an annual written notice of his or her right to petition the court for conditional release under Section 6608. The notice shall contain a waiver of rights. The director shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive his or her right to petition the court for conditional release, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she would not be a danger to the health and safety of others if discharged. The committed person shall have the right to be present and to have an attorney represent him or her at the show cause hearing.

(c) If the court at the show cause hearing determines that probable cause exists to believe that the committed person's diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged, then the court shall set a hearing on the issue.

(d) At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on his or her behalf. The court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged.

(e) If the court or jury rules against the committed person at the hearing conducted pursuant to subdivision (d), the term of commitment of the person shall run for a period of two years from the date of this ruling. If the court or jury rules for the committed person, he or she shall be unconditionally released and unconditionally discharged.

(f) In the event that the State Department of Mental Health has reason to believe that a person committed to it as a sexually violent predator is no longer a sexually violent predator, it shall seek judicial review of the person's commitment pursuant to the procedures set forth in Section 7250 in the superior court from which the commitment was made. If the superior court determines that the person is no longer a sexually violent predator, he or she shall be unconditionally released and unconditionally discharged.

§ 6606. Program of treatment; standards; protocol

(a) A person who is committed under this article shall be provided with programming by the State Department of Mental Health which shall afford the person with treatment for his or her diagnosed mental disorder.

(b) Amenability to treatment is not required for a finding that any person is a person described in Section 6600, nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program.

(c) The programming provided by the State Department of Mental Health in facilities shall be consistent with current institutional standards for the treatment of sex offenders, and shall be based on a structured treatment protocol developed by the State Department of Mental Health. The protocol shall describe the number and types of treatment components that are provided in the program, and shall specify how assessment data will be used to determine the course of treatment for each individual offender. The protocol shall also specify measures that will be used to assess treatment progress and changes with respect to the individual's risk of reoffense.

§ 6607. Determination that future predatory acts unlikely; report and recommendation of conditional release; judicial hearing

(a) If the Director of Mental Health determines that the person's diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual

violence while under supervision and treatment in the community, the director shall forward a report and recommendation for conditional release in accordance with Section 6608 to the county attorney designated in subdivision (i) of Section 6601, the attorney of record for the person, and the committing court.

(b) When a report and recommendation for conditional release is filed by the Director of Mental Health pursuant to subdivision (a), the court shall set a hearing in accordance with the procedures set forth in Section 6608.

§ 6608. Petition for conditional release and discharge; concurrence of director; judicial hearing; subsequent petitions; forensic conditional release program; unconditional discharge; burden of proof

(a) Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release and subsequent unconditional discharge without the recommendation or concurrence of the Director of Mental Health. If a person has previously filed a petition for conditional release without the concurrence of the director and the court determined, either upon review of the petition or following a hearing, that the petition was frivolous or that the committed person's condition had not so changed that he or she would not be a danger to others in that it is not likely that he or she will engage in sexually violent criminal behavior if placed under supervision and treatment in the community, then the court shall deny the subsequent petition unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from a committed person without the concurrence of the director, the court shall

endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing. The person petitioning for conditional release and unconditional discharge under this subdivision shall be entitled to assistance of counsel.

(b) The court shall give notice of the hearing date to the attorney designated in subdivision (i) of Section 6601, the retained or appointed attorney for the committed person, and the Director of Mental Health at least 15 court days before the hearing date.

(c) No hearing upon the petition shall be held until the person who is committed has been under commitment for confinement and care in a facility designated by the Director of Mental Health for not less than one year from the date of the order of commitment.

(d) The court shall hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year. A substantial portion of the state-operated forensic conditional release program shall include outpatient supervision and treatment. The court shall retain jurisdiction of the person throughout the course of the program. At the end of one year, the court shall hold a hearing to determine if

the person should be unconditionally released from commitment on the basis that, by reason of a diagnosed mental disorder, he or she is not a danger to the health and safety of others in that it is not likely that he or she will engage in sexually violent criminal behavior. The court shall not make this determination until the person has completed at least one year in the state-operated forensic conditional release program. The court shall notify the Director of Mental Health of the hearing date.

(e) Before placing a committed person in a state-operated forensic conditional release program, the community program director designated by the State Department of Mental Health shall submit a written recommendation to the court stating which forensic conditional release program is most appropriate for supervising and treating the committed person. If the court does not accept the community program director's recommendation, the court shall specify the reason or reasons for its order on the record. The procedures described in Sections 1605 to 1610, inclusive, of the Penal Code shall apply to the person placed in the forensic conditional release program.

(f) If the court determines that the person should be transferred to a state-operated forensic conditional release program, the community program director, or his or her designee, shall make the necessary placement arrangements and, within 21 days after receiving notice of the court's finding, the person shall be placed in the community in accordance with the treatment and supervision plan unless good cause for not doing so is presented to the court.

(g) If the court rules against the committed person at the trial for unconditional release from commitment, the court may place the committed person on outpatient status in

accordance with the procedures described in Title 15 (commencing with Section 1600) of Part 2 of the Penal Code.

(h) If the court denies the petition to place the person in an appropriate forensic conditional release program or if the petition for unconditional discharge is denied, the person may not file a new application until one year has elapsed from the date of the denial.

(i) In any hearing authorized by this section, the petitioner shall have the burden of proof by a preponderance of the evidence.

(j) If the petition for conditional release is not made by the director of the treatment facility to which the person is committed, no action on the petition shall be taken by the court without first obtaining the written recommendation of the director of the treatment facility.

(k) Time spent in a conditional release program pursuant to this section shall not count toward the term of commitment under this article unless the person is confined in a locked facility by the conditional release program, in which case the time spent in a locked facility shall count toward the term of commitment.

§ 6609. Conditional release program; requests for information on participants; time for compliance

Within 10 days of a request made by the chief of police of a city or the sheriff of a county, the State Department of Mental Health shall ~~provide the~~ following information concerning each person committed as a sexually violent predator who is receiving outpatient care in a conditional release program in that city or county: name, address, date

of commitment, county from which committed, date of placement in the conditional release program, fingerprints, and a glossy photograph no smaller than 3 1/8 x 3 1/8 inches in size, or clear copies of the fingerprints and photograph.

§ 6609.1. Release of sexually violent predators; written notice to local law enforcement officials

(a) When the State Department of Mental Health makes a recommendation to the court for community outpatient treatment for any person committed as a sexually violent predator, it shall notify the sheriff or chief of police, or both, the district attorney, or the county's designated counsel, that have jurisdiction over the following locations:

(1) The community in which the person may be released for community outpatient treatment.

(2) The community in which the person maintained his or her last legal residence as defined by Section 3003 of the Penal Code.

(3) The county which filed for the person's civil commitment pursuant to this article.

The department shall also notify the Department of Corrections' Sexually Violent Predator Parole Coordinator, if the person is otherwise subject to parole pursuant to Article 1 (commencing with Section 3000) of Chapter 8 of Title 1 of Part 3 of the Penal Code.

The notice shall be given at least 15 days prior to the department's submission of its recommendation to the court.

(b) When the State Department of Mental Health makes a recommendation to pursue recommitment, a recommendation not to pursue recommitment, or seeks a judicial review of commitment status pursuant to subdivision (f) of Section 6605, of any person committed as a sexually violent predator, it shall provide written notice of that action to the sheriff or chief of police, or both, and to the district attorney, that have jurisdiction over the following locations:

(1) The community in which the person maintained his or her last legal residence as defined by Section 3003 of the Penal Code.

(2) The probable community in which the person will be released, if recommending not to pursue recommitment.

(3) The county which filed for the person's civil commitment pursuant to this article.

The State Department of Mental Health shall also notify the Department of Corrections' Sexually Violent Predator Parole Coordinator, if the person is otherwise subject to parole pursuant to Article 1 (commencing with Section 3000) of Chapter 8 of Title 1 of the Penal Code. The notice shall be made at least 15 days prior to the department's submission of its recommendation to the court.

Those agencies receiving the notice referred to in this subdivision shall have 15 days from receipt of the notice to provide written comment to the department regarding the impending release. Those comments shall be considered by the department, which may modify its decision regarding the community in which the person is scheduled to be released, based on those comments.

(c) If the court orders the release of a sexually violent predator, the court shall notify the Department of Corrections Sexually Violent Predator Parole Coordinator. The Department of Corrections shall notify the State Department of Mental Health, the sheriff or chief of police, or both, and the district attorney, that have jurisdiction over the following locations:

(1) The community in which the person is to be released.

(2) The community in which the person maintained his or her last legal residence as defined in Section 3003 of the Penal Code.

The Department of Corrections shall make the above notifications regardless of whether the person released will be serving a term of parole after release by the court.

(d) If the person is otherwise subject to parole pursuant to Article 1 (commencing with Section 300) of Chapter 8 of Title 1 of Part 3 of the Penal Code, to allow adequate time for the Department of Corrections to make appropriate parole arrangements upon release of the person, the person shall remain in physical custody for a period not to exceed 72 hours or until parole arrangements are made by the Department of Corrections' Sexually Violent Predator Parole Coordinator, whichever is sooner. To facilitate timely parole arrangements, notification to the Department of Corrections' Sexually Violent Predator Parole Coordinator of the pending release shall be made by telephone or facsimile and, to the extent possible, notice of the possible release shall be made in advance of the proceeding or decision determining whether to release the person.

(e) The notice required by this section shall be made whether or not a request has been made pursuant to Section 6609.

(f) The time limits imposed by this section are not applicable where the release date of a sexually violent predator has been advanced by a judicial or administrative process or procedure that could not have reasonably been anticipated by the State Department of Mental Health and where, as the result of the time adjustments, there is less than 30 days remaining on the commitment before the inmate's release, but notice shall be given as soon as practicable. In no case shall notice required by this section to the appropriate agency be later than the day of release.

(g) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

§ 6609.2. Notice of recommendation regarding disposition of sexually violent predator; immunity

(a) When any sheriff or chief of police is notified by the State Department of Mental Health of its recommendation to the court concerning the disposition of a sexually violent predator pursuant to subdivision (a) or (b) of Section 6609.1, that sheriff or chief of police may notify any person designated by the sheriff or chief of police as an appropriate recipient of the notice.

(b) A law enforcement official authorized to provide notice pursuant to this section, and the public agency or entity

employing the law enforcement official, shall not be liable for providing or failing to provide notice pursuant to this section.

§ 6609.3. Notice to witnesses, victims, or next of kin

(a) At the time a notice is sent pursuant to subdivisions (a) and (b) of Section 6609.1, the sheriff, chief of police, or district attorney notified of the release shall also send a notice to persons described in Section 679.03 of the Penal Code who have requested a notice, informing those persons of the fact that the person who committed the sexually violent offense may be released together with information identifying the court that will consider the conditional release, recommendation regarding recommitment, or review of commitment status pursuant to subdivision (f) of Section 6605a. When a person is approved by the court to be conditionally released, notice of the community in which the person is scheduled to reside shall also be given only if it is (1) in the county of residence of a witness, victim, or family member of a victim who has requested notice, or (2) within 100 miles of the actual residence of a witness, victim, or family member of a victim who has requested notice. If, after providing the witness, victim, or next of kin with the notice, there is any change in the release date or the community in which the person is to reside, the sheriff, chief of police, or the district attorney shall provide the witness, victim, or next of kin with the revised information.

(b) At the time a notice is sent pursuant to subdivision (c) of Section 6609.1 the Department of Corrections shall also send a notice to persons described in Section 679.03 of the Penal Code who have requested a notice informing those persons of the fact that the person who committed the sexually violent offense has been released.

(c) In order to be entitled to receive the notice set forth in this section, the requesting party shall keep the sheriff, chief of police, and district attorney who were notified under Section 679.03 of the Penal Code, informed of his or her current mailing address.

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56766

[May 3, 2005]

JIMMY D. CARTY, Petitioner-Appellant,	)
vs.	)
CRAIG NELSON, Warden; BILL LOCKYER, Attorney General, Respondents-Appellees.	)

Oral Argument Before:

Harry Pregerson, Raymond C. Fisher, and Jay S. Bybee, Circuit Judges

* * * * *

[p.10]

THE COURT: One last question, Counsel. This is here on -- this is here on habeas, and the standard for that is fairly exacting under AEDPA, and you have the burden of showing that the State Court's ruling was contrary to clearly established Supreme Court precedent. What Supreme Court precedent that is clearly established does this violate? Can you give me case names?

MR. BROWN: Yes. That's Gault and Vitek.

THE COURT: In Re Gault.

MR. BROWN: In Re Gault, and Vitek.

THE COURT: Versus Jones.

MR. BROWN: Versus Jones. And Goldberg v Kelly.

* * * * *

Supreme Court, U.S.
FILED
2006 MAR 10
OFFICE OF THE CLERK

No. 05-1203

In the Supreme Court of the United States

JIMMY D. CARTY,

Petitioner,

v.

CRAIG NELSON, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 01CV0721-IEG (JFS)

[Filed February 10, 2003]

JIMMY D. CARTY, Petitioner,
v.
CRAIG NELSON, Warden, Respondent.

REPORT AND RECOMMENDATION RE DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

On April 23, 2001, Jimmy D. Carty, a state prisoner proceeding *pro se*, submitted a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks relief on the following grounds: 1) Petitioner's Due Process rights were violated when insufficient evidence was used in support of the trial court's decision to commit the Petitioner under the California Welfare and Institutions Code § 6600 *et seq.*; and, 2) Petitioner's Sixth Amendment right to confrontation of a

witness and Fourteenth Amendment right to due process of law were violated when the trial court relied on inadmissible hearsay.

This Court has reviewed the petition for writ of habeas corpus, Respondent's answer, and the supporting documents submitted, and **RECOMMENDS** that the petition be **DENIED**.

II. PROCEDURAL HISTORY

On April 24, 1991, Petitioner pled guilty to seven counts of Committing a Lewd and Lascivious Act Upon a Child Under the Age of 14 Years, in violation of California Penal Code § 288(a). (Lodgment # 1, 1 Clerk's Transcript (CT) at 2.) These acts were perpetrated on seven different victims, two of whom were the Petitioner's biological sons. (*Id.*) Petitioner admitted to having substantial sexual conduct with these two children, both under 11 years of age. Further, Petitioner admitted to allegations that he stood in a position of trust with two of the victims, as they were Petitioner's biological sons. (*Id.*) Petitioner admitted his conduct as to the two counts involving his biological sons, but plead guilty pursuant to *People v. West*, 3 Cal. 3d 595 (1970), as to the remaining five counts.[1] *See* Doc. No. 7 at 2. Stated Differently, Petitioner only admitted that there was substantial sexual conduct with his two biological sons, while pleading guilty without admitting the facts alleged with respect to the remaining five counts. *See* Lodgment #2 at 8-9. On June 3,

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[1] In *People v. West*, the California Supreme Court allowed legal recognition of plea bargains based on pleas of guilty or *nolo contendere* without the pleader personally admitting guilt, but rather stipulating to the governments facts. *See People v. West*, 3 Cal. 3d at 611.

1991, Petitioner was sentenced to state prison for a term of 16 years. (CT at 2).

On April 23, 1999, one day before being released on parole from the California Department of Corrections, the San Diego County District Attorney filed a civil commitment petition against Petitioner, pursuant to California's Sexually Violent Predator Act (SVPA), Cal. Welf. & Institutions Code § 6600, et seq. This petition was filed to determine whether Petitioner should be committed to the State Department of Mental Health for a period of two years.[2] (Lodgment # 1, 1 CT at pp. 1-6.) On April 30, 1999, Petitioner waived his right to a probable cause hearing. (*Id.* at 124.) Subsequently, on June 23, 1999, Petitioner waived his right to a jury trial. (*Id.* at 125.)

Following a commitment trial on June 24, 1999, the state trial court found Petitioner, by reason of a diagnosed mental disorder and his previous criminal acts, to be a sexually violent predator and a danger to the health and safety of others. Based on this finding, the state trial court granted the District Attorney's civil commitment petition. (Lodgment # 1, 1 CT at 119.) The court ordered Petitioner committed for two years to the Department of Mental Health, Atascadero State Hospital, pursuant to California Welfare and Institutions Code §§ 6600 - 6604. Petitioner's commitment is subject to renewal for an indefinite period of time; contingent upon a finding that Petitioner is a continuing threat as a sexually violent predator. *See* Cal. Welfare and Institutions Code §§ 6604, 6605.

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[2] The San Diego County District Attorney filed the above referenced civil commitment petition based upon Petitioner's conviction and diagnosed mental disorder which makes him a danger to the health and safety of others. (*Id.*).

On December 15, 1999, Petitioner appealed the state court's granting of the civil commitment petition. Petitioner alleged in his appeal that: 1) the evidence presented to the trial court was not sufficient to support a finding of substantial sexual contact, as required by CA's Welfare and Institutions Code, § 6601.1; and, 2) the trial court erred in improperly admitting hearsay evidence in determining whether Petitioner was a sexually violent predator. Petitioner further alleged that the above infringements have resulted in involuntary commitment, due process violations and a violation of his right to confront witnesses. On May 11, 2000, in an unpublished opinion, the California Court of Appeal affirmed the trial court's Commitment Order. *People v. Carty*, No. D033778 (May 11, 2000); (Lodgment # 5 at 13). On June 12, 2000, Petitioner filed a petition for review in the California Supreme Court alleging the same violations. The California Supreme Court denied the petition for review on July 19, 2000. (Lodgment # 7.)

On April 23, 2001, Petitioner filed the instant Petition for a Writ of Habeas Corpus with the Federal District Court for the Southern District of California. Respondent filed an Answer to the Petition on July 23, 2001. After being granted several extensions of time, Petitioner filed his traverse on May 28, 2002.

III. FACTUAL BACKGROUND

The following facts are taken from the California Court of Appeal's opinion in *People v. Carty*, No. D033778, slip op. at 6 (See Lodgment # 5), the other documents lodged in the instant case, and the parties' motion papers to the instant petition. The Court relies upon these facts pursuant to 28 U.S.C. § 2254(e) (2001). *See Parke v. Raley*, 506 U.S. 20, 35-36 (1992) (questions of historical fact, including inferences

properly drawn from such facts, are entitled to a statutory presumption of correctness); *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981) (stating that deference is owed to findings of fact both at the state trial and state appellate court level); *Tinsley v. Borg*, 895 F.2d 520, 524-26 (9th Cir. 1990) (stating that factual findings of both state trial and state appellate courts are entitled to presumption of correctness on federal habeas corpus review).

A. Factual Summary

After pleading guilty to seven counts of Committing a Lewd and Lascivious Act upon a child under the age of fourteen, and serving a prison term from April 1991 through April 1999, the San Diego District Attorney filed a civil commitment suit against Petitioner on April 23, 1999, one day before Petitioner was to be released from a California correctional facility. Petitioner was again taken into custody and on April 30, 1999, Petitioner was brought before a Superior Court.[3] At the April 30, 1999 court appearance, Petitioner waived his right to a probable cause hearing. *See* CT at 124. Petitioner was remanded to the custody of the police department and trial was set for June 23, 1999. *Id.* On June 23, 1999, Petitioner appeared before the Superior Court to commence trial. During the pretrial proceedings, Petitioner waived his right to a trial by jury. *See* CT at 125. The Superior Court then set a "court trial" to commence on June 24, 1999. Id. On June 24, 1999, Petitioner again appeared before the Superior Court and was questioned by the court regarding his waiver of a jury trial. After the court

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[3] It is presumed that Petitioner was brought before the Superior Court for a probable cause hearing. However, the record is not clear as to why Petitioner was brought before that Court on April 30, 1999. *See* CT at 124.

determined that Petitioner's waiver of a jury trial was "knowing and intelligent," the court proceeded with a "court trial."[4] *See* CT at 127.

It appears from the record that neither the state nor the defense presented any witnesses to testify as to Petitioner's mental state or as to the past episodes of sexual conduct between Petitioner and his victims. Rather, it appears from the record that the court reached its decision based solely on documentary evidence presented by the parties to the commitment action. *See* Lodgement #2 at 32-37.

B. Predicate Offenses

On April 21, 1991, Petitioner pled guilty to seven counts of lewd acts upon children (Pen. Code., § 288, subd. (a)), and admitted that two of the acts were committed against his biological sons. These acts constitute substantial sexual conduct as per Pen. Code, § 1203.066, subd. (a)(8). Petitioner's guilty pleas as to five remaining counts were entered pursuant to *People v. West*, (1970) 3 Cal.3d 595.[5] Accordingly, Petitioner did not make express admissions as to the conduct in such counts. Petitioner was sentenced to a 16-year term.[6]

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[4] The term "court trial" is used to refer to a trial in which the judge is the fact finder, as well as the interpreter of law, commonly referred to as a "bench trial" in federal courts.

[5] *See* n. 1, *supra*.

[6] The offenses involving Carty's own children were not considered by the court as "predatory offenses" within the meaning of the Act, but were considered in the psychological reports in the assessment of Carty's mental condition. Since those charges were

The probation report lists the victims of the remaining counts by number. We list both the number and the first names for clarity.

Victim 3 was eight-year-old Brandon S. During an overnight visit at Petitioner's home, Petitioner repeatedly grabbed Brandon's genital area over his clothing. This conduct lasted several hours during which Petitioner refused to stop even though Brandon objected to the touching.

Victim 4 was six-year-old Chad H. While Chad H. played with Petitioner's children, Petitioner touched Chad's "front private" numerous times both under and over his clothing.

Victim 5 was five-year-old Chase A. Chase A. was subjected to Petitioner pulling his shorts, pinching his penis and biting his "private" which Chase described as his upper thigh. Petitioner admitted he pinched Chase's penis.

Victim 6 was seven-year-old Sean S. Sean S. reported that Petitioner touched his "private part" over his clothing while he watched television in Petitioner's home.

Victim 7 was fourteen-year-old Michael H.. Michael H. was molested three times by Petitioner during the summer of 1990. Petitioner caressed Michael H.'s leg and repeatedly grabbed his "private part" over his clothing.[7]

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not used in determining whether Carty committed the requisite predatory offenses, they are not included here.

[7] Since Carty does not challenge either the admissibility or sufficiency of the *psychological* evidence presented which defines him as a Sexually Violent Predator as described in the Act, a summary of that evidence is omitted here.

IV. PETITIONER'S CONTENTIONS

Petitioner now brings a petition for a writ of habeas corpus alleging: 1) Petitioner's Fourteenth Amendment right to due process of law was violated because the trial court lacked sufficient evidence to find, beyond a reasonable doubt,[8] that Petitioner engaged in substantial sexual conduct in violation of Section 6600.1; and, 2) Petitioner's Sixth Amendment Right to Confrontation of Witnesses and Fourteenth Amendment right to due process of law were violated when the trial court relied on inadmissible hearsay evidence in determining Petitioner to be a sexually violent predator within the meaning of the SVPA.

V. STANDARD OF REVIEW

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in *violation of the Constitution or laws or treaties of the United States*.

28 U.S.C. § 2254(a) (West 2002) (emphasis added).

A federal habeas corpus petition must allege a deprivation of one or more federal rights to present a cognizable claim

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[8] Cal. Welf. & Inst. § 6400 requires elements under the SVPA be proved beyond a reasonable doubt for commitment. *See* n.8, below.

pursuant to § 2254. A state's interpretation of its laws or rules provides no basis for federal habeas corpus relief because no federal constitutional question exists. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (federal habeas corpus relief does not lie for errors of state law, and federal courts may not reexamine state court determinations on state law issues).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "worked substantial changes to the law of habeas corpus." *Moore v. Calderon*, 108 F.3d 261,263 (9th Cir. 1997). As amended by AEDPA, 28 U.S.C. § 2254(d) now reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2002).

In evaluating this appeal the Court must: 1) identify the state court decision which adjudicates the merits of Petitioner's claims; and, 2) determine whether that decision was "contrary to or involved an unreasonable application of

clearly established federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." *Id.*

In the instant case, the California Court of Appeal rejected all of Petitioner's claims in a reasoned state judgment on July 16, 1999. (Lodgment #7). Petitioner subsequently sought review of the Appellate Court opinion in the California Supreme Court. (Lodgment #8). On September 29, 1999, the California Supreme Court denied the petition for review by an order which stated in full: "Appellants' petition for review DENIED." (Lodgment #9). The California Supreme Court did not articulate its rationale for denying review of the Appellate Court holding. The California Court of Appeal was the last state court to render a reasoned state judgment. Therefore, this Court will proceed upon the rebuttable presumption that the California Supreme Court concurred with the rationale of the California Court of Appeal holding and therefore take the California Court of Appeal holding for purposes of the § 2254(d) review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) ("where there has been one reasoned state judgment rejecting a federal claim, [the rebuttable presumption is that] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground").

Pursuant to § 2254(d), this Court must determine whether the Court of Appeal opinion was 1) "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court" and/or 2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." *See* 28 U.S.C. § 2254(d)(1), (2) (West 2002). If one of these conditions is met, then this court may grant habeas relief. However, if none of the conditions are met, then no relief

may be granted.

1. Contrary to, or Unreasonable Application of. Clearly Established Federal Law

Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions." *Williams (Terry.) v. Taylor*, 529 U.S. 362, 412 (2000). Ninth Circuit case law serves as persuasive authority for the purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court precedent. This persuasive authority may also help determine what is meant by "clearly established federal law". *Tuan Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000).

A state court's holding may be found to be "contrary to" clearly established Supreme Court precedent if: (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the U.S. Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams (Terry)*, 529 U.S. at 405-06.

Additionally, a state court holding involves an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal rule" but "unreasonably applies it to the facts of the particular state prisoner's case," or "if the state court either unreasonably extends a legal principle...to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. These two concepts overlap and it is sometimes necessary to test a petitioner's allegations against both standards. *Tuan Van*

Tran, 212 F.3d at 1150.

2. Unreasonable Determination of the Facts in Light of the Evidence

This Court may also grant habeas relief if the state court's holding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2) (West Supp. 2002). The Ninth Circuit has held that adjudication of Petitioner's claims involves an "unreasonable determination of the facts" or amounts to an "unreasonable application of law," when "an independent review of the legal question...leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous—in other words that clear error occurred." *Tuan Van Tran*, 212 F.3d at 1153-54; *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000). In examining whether a state court's adjudication was unreasonable, this Court "first considers whether the state court erred at all; only after concluding that an error occurred does this court decide whether that error involved an unreasonable application of controlling law within the meaning of section 2254(d)." *Anthony v. Cambra*, 236 F.3d 568, 578 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2576 (2001); *Van Tran*, 212 F.3d at 1154-55.

VI. DISCUSSION

The first issue that this Court must address is Petitioner's claim that his commitment violates his Fourteenth Amendment right to due process of law. Petitioner claims that there was insufficient evidence before the trial court to prove the predicate offenses for commitment under the SVPA. Respondent counters that there was sufficient evidence to

support the trial court's commitment of Petitioner under the SVPA. The second issue this Court must consider is whether the trial court relied on inadmissable hearsay evidence when reaching its decision to commit Petitioner. Petitioner alleges that the trial court relied on inadmissible hearsay, and in doing so violated Petitioner's Due Process Rights and Sixth Amendment right to confrontation of witnesses. Respondent asserts that the statements the trial court relied on are admissible, as they are exceptions to the hearsay rule. Further, Respondent contends that admission of these statements into evidence does not offend Due Process, specifically, and that Petitioner has no right under the Sixth Amendment to confront witnesses in a civil commitment proceeding.

The Court will address each issue in the order presented.

A. Petitioner's First Contention: Insufficient Evidence Of Substantial Sexual Conduct

Petitioner asserts that his Fourteenth Amendment right to due process of law was violated when the State failed to provide sufficient evidence to support the trial court's determination that Petitioner's conduct constituted "substantial sexual conduct" to meet the predicate offenses under California Welfare and Institutions Code § 6600.1. (Petition for writ of habeas corpus at 6, attached page.)

Respondent counters that sufficient evidence was presented to support the trial court's finding that there was "substantial sexual conduct" to meet the predicate offenses required under §§ 6600, et. seq. In addition, Respondent counters that Petitioner failed to show that the state court's holding is contrary to, or an unreasonable application of,

federal law. (Respondent's Mem. of P&A's in Supp. of Answer at 9).

1. Standard of Review for Sufficiency of the Evidence Claims:

To determine the standard of review for sufficiency of the evidence claims, the Court must first identify and refer to the relevant federal law. *See Williams v. Taylor*, 529 U.S. 362, 407 (2000). The evidentiary standard in civil commitment proceedings under California's SVPA, is analogous to the standard used in criminal proceedings, and requires that plaintiffs prove guilt "beyond a reasonable doubt". *People v. Mercer*, 70 Cal. App. 4th 463, 465-66 (1999) (holding that the standard of review for sufficiency of the evidence claims in SVPA commitments is the same as that for criminal convictions).

In dealing with review of such cases, the Supreme Court holds that:

> [o]nce a defendant has been found guilty of the crime charged, the factfinder's role as the weigher of evidence is preserved through a legal conclusion that...all of the evidence is to be considered in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Federal courts need not weigh the evidence to determine if there is guilt beyond a reasonable doubt. Rather, reviewing courts should determine whether the evidence is such that "*any* rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.[9] *Id.* (emphasis original).

Additionally, the Supreme Court held that the Fourteenth Amendment's Due Process Clause is violated, and an applicant is entitled to habeas corpus relief, "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Upon review, federal courts must analyze sufficiency of the evidence claims "with explicit reference to the substantive elements of the criminal offense as defined by *state law*." *Id.* at 324 n. 16 (emphasis added). Federal courts are bound by a state court's construction of its own penal statutes, and must defer to that interpretation unless it is "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation." *Aponte v. Gomez*, 993 F.2d 705, 707 (9th Cir. 1993).

In analyzing Petitioner's sufficiency of the evidence claims, the Court must engage in a thorough review of the state court record. *See Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997). "Without such a review of the record, it is

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[9] Although SVPA Commitment hearings are civil proceedings, California Welf. & Inst. section 6604 requires that "the court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Cal. Welf. & Inst. § 6604; *see Addington v. Texas*, 441 U.S. 418, 425 (1979) (holding that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection); *see also People v. Hurtado*, 52 P.3d 116, 117 (Cal. 2002) (holding that in cases involving involuntary commitment, failure to prove the elements beyond a reasonable doubt constitutes reversible federal constitutional error).

impossible to determine whether the state court adjudication rested on an 'unreasonable application' of clearly established federal law or an 'unreasonable determination' of fact." *Id.*

In this case, the California Supreme Court did not state a reason or give any authority in denying Petitioner's Petition for Review, therefore there is no decision from the California Supreme Court to which this Court can look. (Lodgment # 7.) As a result, this Court must rely on the California Appellate Court opinion dated May 11, 2000, *People v. Carty*, No. D033778. This holding will serve as the relevant record when conducting review pursuant to 28 U.S.C. § 2254(d)(1).

2. Standard of Law - "Substantial Sexual Conduct"

The SVPA defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600 (a)(1). Under the SVPA a "sexually violent offense" includes certain enumerated sex crimes[10] "committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." Cal. Well. & Inst. Code § 6600(b). Additionally, § 6600.1 states that "[i]f the victim of an underlying offense that is specified in subdivision (b) of § 6600 is a child under the age of 14 and the offending act or acts involved substantial sexual conduct,

---

[10] *See* California Penal Code § 288(a) (making it a felony to engage in the touching of a person under the age of fourteen, or any part thereof, with the intent to arouse sexual desires of the perpetrator or the victim).

the offense shall constitute a sexually violent offense for purposes of § 6600." Cal. Welf. & Inst. Code § 6600.1 (a). Subsection (b) includes in its definition of "substantial sexual conduct" "masturbation of either the victim or the offender." Cal. Welf. & Inst. Code § 6600.1 (b). California Courts have determined that "masturbation under the [SVPA] encompasses any touching or contact, however slight, of the genitals of either the victim or the offender, with the requisite intent...." *People v. Chambless*, 88 Cal. Rptr. 2d 444, 451 (Cal. Ct. App. 1999).

In *Chambless*, the Court of Appeal reviewed the legislative history of the SVPA and concluded that the definition of masturbation, which includes mere touching of the victim's genitals, is consistent with the legislature's intent to make criminal certain sexual behavior. The Appellate Court stated:

> [t]he analysis of the Senate Committee on Criminal Procedure regarding Senate Bill No. 2161, 1995-1996 Regular Session, which added section 6600.1, stated the key issue was 'Should the definition of 'sexually violent predator' be expanded to include specified nonviolent sexual offenses on a victim under the age of 14?' Sen. Com. on Crim. Proc., Analysis of Sen. Bill No. 2161 (1995-1996 Reg.Sess.), p. 2. We presume the Legislature in affirmatively answering this question and amending section 6600.1 to include the specific nonviolent act of masturbation in subdivision (b) as substantial sexual conduct was aware of the general use of that term to describe any act of genital touching. Because the Legislature was also aware oft lie 'the [sic] longstanding rule that [Penal Code] section 288 is violated by 'any touching' of an underage child accomplished with the intent of

> arousing the sexual desires of either the perpetrator or the child' [citation omitted], its inclusion of such offenses as predicate crimes under the Act while at the same time requiring they satisfy the definition of substantial sexual conduct evidences its intent to define conduct that goes beyond the mere touching of any part of the body of an underage child required for a conviction under Penal Code section 288, subdivision (a). We thus believe the sexual conduct described by the term 'masturbation' in subdivision (b) of section 6600.1 refers to the specific type of touching required, that of the genitals of either the victim or the offender.

Chambless, 88 Cal. Rptr. at 452-53.

Further, in *Chambless*, the Court of Appeal evaluated other sections of the SVPA under well-established rules of statutory construction and contemplated that:

> [b]ecause the legislature took the definition of substantial sexual conduct for the Act (§ 6600. l(b)) directly from Penal Code section 1203.066, subdivision (b) (see Sen. Com. on Crim. Proc., Analysis of Sen. Bill No. 2161, (1995-1996) Reg.Sess.), p. 3), we presume it intended to use the terms in a like manner. [citations].Thus the type or extent of oral copulation sufficient to show substantial sexual conduct under section 6600.1, subdivision (b) would necessarily be the same as that construed by the court in *Grim*.[11]

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[11] *Grim* held that a jury instruction which defined oral copulation as "any contact, however slight, between the mouth of one person and the sexual organ of another person constitutes 'oral

> Similarly, because section 6600.1, subdivision (b) provides that masturbation as well as oral copulation can mean substantial sexual conduct, by parity of reasoning we believe the Legislature intended the extent of touching of the genitals required to meet the definition of masturbation would also be the same as in *Grim*. Hence, any contact, however slight of the sexual organ of the victim or the offender would be sufficient to qualify as masturbation and in turn substantial sexual conduct under the Act.

Id. at 453-454.

3. Review of the California Appellate Court's Decision:

In denying Petitioner's appeal, the Appellate Court adopted the reasoning set forth in *Chambless*. (Lodgment #5 at 11-13.) Therefore, upon review, this Court shall consider *Chambless*' reasoning, under U.S.C. § 2254(d)(1). First, the definition of "masturbation" delineated in *Chambless* is not untenable, but rather was deduced through the Court's utilization of well founded rules of statutory construction. *See Aponte*, 993 F.2d at 707. In defining "masturbation," the court in *Chambless* looked at the legislative intent of the statute. The court also considered the statutory scheme, and specifically, how analogous portions of the California Penal Code, referenced in the SVPA, had been interpreted by previous courts. Based on the above mentioned evaluation, the *Chambless* court arrived at a definition of masturbation. Further, although the opinion rests solely on California state

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copulation'" was proper. *People v. Grim*, 11 Cal. Rptr. 2d 884, 885 (Cal. Ct. App. 1992).

law, nothing in the opinion indicates an attempt to avoid federal review of a constitutional question. *Aponte*, 993 F.2d at 707. Therefore, under *Jackson* and *Aponte*, this court is bound by the state court's definition of "masturbation."

This determination, however, does not end this Court's inquiry. The Appellate Court did not address Petitioner's due process claim of a failure to provide sufficient evidence to support his commitment, therefore, this Court must "review independently the claims of the petition." *See Delgado*, 223 F.3d 976, 981-82 (9th Cir. 2000) (citing *Delgado I*). However, after an independent review of Petitioner's claim, given the established definition of masturbation, and the fact that masturbation of a child under fourteen years of age is sufficient to constitute "substantial sexual conduct" under the SVPA, and considering the uncontradicted facts set forth in the probation report, it was reasonable for a trier of fact to conclude that the elements of the SVPA were met beyond a reasonable doubt. *See Delgado*, 223 F.3d at 992; *Jackson*, 443 U.S. at 324.

The Court of Appeal of California held:

> When we review a challenge to the sufficiency of the evidence we apply the substantial evidence standard. Under that standard we review the entire record, drawing all reasonable inferences in favor of the decision of the trial court. We do not weigh the evidence nor do we make credibility judgments. We simply determine if, in light of all the evidence, a reasonable trier of fact could reach the conclusion reached in the matter before us. *People v. Mercer* (1990) 70 Cal.App.4th 463,464-465.

> Applying the proper standards we are satisfied there is sufficient evidence to support the trial court's decision.
>
> Carty's conduct in grabbing the genitals of several children, both over and under the clothing constituted masturbation as it has been defined in section 6600.1, subdivision (b) and in our opinion in *Chambless*, *supra*, 74 Cal.App.4th 773. Carty recognizes our opinion is controlling in this case and that the conduct with the children, other than his own, constitutes substantial sexual conduct under *Chambless*. Carty argues that *Chambless* was wrongly decided, We disagree.
>
> We have again reviewed our opinion in *Chambless*, *supra*, 74 Cal.App.4th 773. The Supreme Court has denied review. We remain satisfied with our analysis and will continue to follow it unless directed otherwise by a higher court.

(Lodgment #5 at 11-13.)

The instant case proceeded as a bench trial. Accordingly, this Court will rely on the evidence furnished to the trial judge for a recitation of the facts. In support of the Civil Commitment Petition, the prosecution introduced into evidence a probation report associated with Petitioner's 1991 conviction. (Lodgment #2 at 9-34.) This 1991 probation report included Children's Hospital Examination Reports reciting the victims' accounts of their molestation by Petitioner. *See Id.* at 13-17. Specifically, the report stated that Victim #5, five-year-old Chase A., had explained that Petitioner "pinched" his penis and bit his upper thigh. (Lodgment #1 at 15.) This same probation report included

Petitioner's statement that he admitted to pinching the victim's penis. (Lodgment #1 at 17.) Furthermore, Victim #3, eight-year-old Brandon S., stated that Petitioner had "grabbed" his genital area for several hours. (Lodgment #1 at 13.) The report also contains statements of molestation taken from victims #1, #2, #4, #6 and #7. *See id.* at 13-17.

It follows that the Petitioner's acts, including "pinching" and "grabbing" the victims, constitute "masturbation" under *Chambless*, and additionally, constitute "substantial sexual conduct" under California Welfare and Institutions Code § 6600.1. Since the SVPA only requires that there be two victims, and here there were a total of seven victims (two of which were Petitioner's biological sons), this Court finds that there is sufficient evidence for a "reasonable" trier of fact to find that Petitioner engaged in masturbation with his victims and that this conduct constitutes "substantial sexual conduct" under the California Welfare and Institutions Code § 6600.1. Additionally, this Court finds that sufficient evidence existed for the trial court to determine Petitioner to be a sexually violent predator under California's SVPA. The trial court acted in accordance with established law when it committed Petitioner as prescribed by the SVPA. This Court may only grant habeas relief if the state court's decision was based on an unreasonable determination of the facts or was contrary to, or an unreasonable application of, clearly established federal law. This Court finds that no such error exists here as to warrant habeas relief. Accordingly, Petitioner's first claim fails.

B. The Trial Court Did Not Err In Admitting Hearsay Evidence

Petitioner's second assertion is that the trial court erred in admitting into evidence Petitioner's probation report.

Petitioner claims that in admitting said report, the trial court relied on inadmissible hearsay evidence, and then used this evidence to assess whether or not Petitioner met the criteria necessary to be classified as a sexually violent predator. Petitioner contends that in considering this inadmissible hearsay, the trial court violated both his Sixth Amendment right to confrontation of witnesses and his Fourteenth Amendment right to due process of law. To support this argument Petitioner asserts the following: 1) the SVPA does not allow for unlimited admission of unreliable and unsubstantiated testimony; 2) the victims' statements did not fit any exception to the hearsay rule and therefore their admission violated Petitioner's Confrontation and Due Process rights; and, 3) the trial court relied exclusively on multiple levels of hearsay that were both inadmissible and highly unreliable in determining that Petitioner was a sexually violent predator.

In opposition, Respondent asserts that the SVPA specifically allows for documentary evidence, such as probation reports, to be used to establish the predicate offenses during civil commitment proceedings. Further, Respondent asserts that the legislature intended this type of documentary evidence to be an exception to the hearsay rule and admissible in SVPA civil commitment proceedings. In addition, Respondent asserts that the trial court's admission of Petitioner's probation report cannot be shown to be contrary to or an unreasonable application of federal law. Also, Respondent challenges whether Petitioner has even alleged a cognizable claim, as generally state evidentiary rulings do not serve as a basis for federal habeas relief.

In regards to Petitioner's constitutional challenges, Respondent asserts that Petitioner's Sixth Amendment right to confrontation is not offended by the SVPA's hearsay

exception because commitment proceedings pursuant to the SVPA are civil proceedings. The Sixth Amendment's right to confrontation is reserved for criminal proceedings. Respondent argues that any rights Petitioner might have to confront and cross-examine witnesses in a civil proceeding would be Fourteenth Amendment Due Process rights, and not Sixth Amendment rights. Lastly, Respondent contends that there was no due process violation when probation reports, which included hearsay statements, were considered in these proceedings, as Petitioner was afforded the opportunity to challenge the hearsay statements at his sentencing hearing.

1. A Cognizable Claim Must Be Presented To Obtain Federal Review

In order to obtain federal habeas review, a petitioner must allege a deprivation of a federal right pursuant to § 2254. A state's interpretation of its laws or rules provides no basis for federal habeas corpus relief because no federal constitutional question arises. *See Estelle*, 502 U.S. at 68 (stating that federal habeas corpus relief does not lie for errors of state law, and federal courts may not reexamine state court determinations on state law issues); *see also Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (federal courts must respect state court's application of state law); *Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990) (federal courts have no authority to review state's application of state law); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir. 1989) (stating that federal courts are not concerned with errors of state law unless they rise to level of constitutional violation).

State court errors in the application of state evidence rules are not a sufficient basis for habeas relief. *Fuller v. Roe*, 182 F.3d 699, 703 (9th Cir. 1999). "A state court's procedural or evidentiary ruling is not subject to federal habeas review

unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). (*See Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir.1991); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). The admission of evidence must be an error "of such magnitude that the result denies a fundamentally fair trial guaranteed by due process." *Fuller*, 182 F.3d 703. (*See Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986)).

Given the above analysis, those claims alleged by Petitioner, to the extent they rely on state law, are not cognizable claims for federal habeas review. In regards to Petitioner's allegation that the admission of hearsay statements was so prejudicial as to amount to violations of his Sixth and Fourteenth Amendment Due Process rights, this Court will review those claims.

2. Petitioner's Sixth Amendment Claim

The Sixth Amendment to the United States Constitution provides:

> [i]n all *criminal* prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

> favor, and to have the Assistance of Counsel for his defense.

(U.S. Const., amend. VI) (emphasis added).

The Sixth Amendment affords protection to all criminal defendants in "criminal prosecutions." *Id.* In reviewing a Kansas statute similar to California's SVPA, the United States Supreme Court held that commitment proceedings provided by Kansas' SVPA statute were civil in nature, and not criminal. *See Kansas v. Hendricks*, 521 U.S. 346 (1997).

Since Petitioner's claims arise out of a civil commitment proceeding, which is civil in nature and not criminal, the Sixth Amendment right to confrontation is inapplicable. Accordingly, Petitioner's claim that his Sixth Amendment right to confrontation has been violated should be denied.

3. Petitioner's Due Process Claim

Petitioner asserts that his right to due process of law under the Fourteenth Amendment was violated by the admittance of hearsay evidence, specifically statements and facts contained in his probation report. Petitioner contends that this evidence was inadmissible as it violated an essential part of Due Process; his right to confront and cross-examine witnesses against him.

The Supreme Court has recognized that civil commitment "constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). The Supreme Court has also held that there is a procedural due process right to confrontation in civil proceedings. *See Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963). In *United States v. Owens*,

the Supreme Court stated: "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1998) (citations omitted). Accordingly, this Court may review the instant habeas petition only if Petitioner was not given an effective opportunity to confront those who accused him of substantial sexual conduct with the respective victims.[12]

The California Court of Appeal ascertained that Petitioner was given an adequate opportunity to confront and cross-examine the witnesses presented by the Prosecution. In considering the SVPA's hearsay exception and whether or not Petitioner was given his requisite due process, the Court stated:

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[12] No hearsay objection can be raised because under the SVPA, in a civil commitment trial,

> [t]he existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health. Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

Cal. Welf. & Inst. Code § 6600(a)(3). Even if Petitioner had raised an evidentiary objection, the Court could not reach the merits of such a claim as that would involve interpretation of state law.

The trial court reasoned, and we agree, that the probation report was the subject of potential challenge at the time of sentencing. Carty had both the opportunity and the motivation to challenge any inaccuracies in that report. Therefore, the report in its final form carried greater reliability, justifying legislative acceptance on that type of document as a method of proof....

We start our analysis with the observation that a proceeding under the [SVPA] is a civil proceeding and not a criminal case. Therefore the Sixth Amendment rights do not attach. On the other hand, a respondent in a civil proceeding, such as this, has a due process right to confront and cross-examine witnesses. (*Hubbart*, *supra*, (1999) 19 Cal.4th at pp. 1174-1175; *In re Melinda S.* (1990) 51 Cal.3d 368, 383 fn. 16.) Under a due process analysis we look to see if the method for challenge available to the respondent provides the benefits that derive from confrontation and cross-examination. (*Howard*, *supra*, 70 Cal. App.4th at p. 154.)

Carty had the ability to call witnesses and to challenge the accuracy of the probation officer's report. He could have presented conflicting evidence on his own behalf in order to undermine the prosecution's case. (§ 6603.). Thus we agree with the court in *Howard*, *supra*, 70 Cal. App.4th 136, that the Act does meet due process standards in permitting the prosecution to go forward and prove the details of past crimes without having to bring back the victims to again prove the crimes against them: The legislative balance of interests is appropriate because it, like the procedure in *In re Melinda S.*, *supra*, 51 Cal.3d 368,

> provides a respondent with a meaningful opportunity to attack the credibility of the prosecution's evidence. The trial court did not err in admitting the probation report.

(Lodgment #5 at 10-11.)

Given the analysis done by the Court of Appeal, and upon its own review of the entire record, this Court concurs with the finding that Petitioner was afforded sufficient due process. Specifically, he was given a reasonable opportunity to effectively confront the evidence against him. In fact, Petitioner was given a direct opportunity to confront the evidence in the probation report at the bench trial by presenting rebuttal evidence in the form of contrary documentary evidence or witness testimony, or of calling the individuals who made mental evaluations regarding Petitioner's mental state to question the bases of their respective evaluations. Lodgment #2 at 34-36. However, Petitioner failed to present any such evidence, and in fact waived his right, at the commitment trial, to confront and/or present such witnesses. *Id.*; *See also* Respondent's Mem. of P&A's in Supp. of Answer at 17. Though Petitioner was given several opportunities to challenge the evidence contained in his probation report, he failed to do so.[13] Because due process requires that Petitioner be afforded the opportunity to rebut or call into question the evidence presented by plaintiffs, and Petitioner was given such opportunity at trial, this Court concludes that Petitioner was afforded sufficient due process of law in the civil commitment proceeding. Accordingly, Petitioner's due process argument fails and the petition should be denied.[13]

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[13] Under this Court's reading of the California Court of Appeal's opinion regarding Petitioner's commitment, it is noted

VII. CONCLUSION AND RECOMMENDATION

After a thorough review of the record in this matter, the undersigned Magistrate Judge **RECOMMENDS** that the Petition for Writ of Habeas Corpus be **DENIED** with prejudice. This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

IT IS SO ORDERED that no later than **February 24, 2003**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the court and served on all parties no later than **March 10, 2003**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: 2-7-03 /s/_____
Hon. James F. Stiven
United States Magistrate Judge

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that at the underlying criminal trial, Petitioner pled guilty to the seven counts against him (albeit the plea was under *People v. West* for the five counts not involving his two sons) and thus Petitioner elected, at the criminal trial, not to contest the governments evidence of guilt. Further, it appears that at the sentencing hearing for the underlying criminal conviction, Petitioner could have, but did not present evidence to rebut or contradict the probation report.